Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

LISA GRANBERRY, COSETTI JORDAN, ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL,

Petitioners,

On behalf of themselves and all others similarly situated,

v.

ISLAY INVESTMENTS, a California general partnership, MARVIN TREVILLIAN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does it violate the federal due process rights granted by the Fifth and Fourteenth Amendments to the United States Constitution for a state trial court to adjudicate in a class action offset claims raised by the defendant against individual absent class members where:

a. each offset claim is based on a unique individualized set of facts unrelated to the common facts of the defendant's conduct on which the representative plaintiffs' certified class claims were based;

b. the representative plaintiffs cannot adequately represent the individual class members in a defense of each claim because the facts relevant to defending the claim are known only to the individual class member against whom it is being asserted;

c. the absent class members have been given only a non-specific notice that offset claims may be asserted against them; and

d. the method of notice to the absent class members was by publication and/or mailing to stale unverified addresses?

2. Is it a violation of due process under the Fifth and Fourteenth Amendments to the United States Constitution for a trial court to order that the unclaimed portion of a class action judgment be returned unconditionally to the defendant where the class judgment consists of an aggregation of specific liquidated amounts found legally

QUESTIONS PRESENTED – Continued

due to each individual class member, where the defendant has no legal claim on the class funds, and where the individual absent class members have received no notice that their rights will be extinguished?

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OPINIONS BELOW

The Class Action Judgment After Remand (App, *infra*, 74) incorporating the Statement of Decision (App, *infra*, 58) both issued by the Superior Court of the State of California for the County of Santa Barbara, are unreported. The decision of the California Court of Appeals, Second Appellate District, Division Six (App, *infra*, 39) is unreported, as is the denial of Petitioner's Petition for Review to the California Supreme Court (App, *infra*, 78). The decision of the California Supreme Court in *Granberry III* is reported at *Granberry v. Islay Investments*, 9 Cal.4th 738, 889 P.2d 970, 38 Cal.Rptr.2d 650 (1995) (App, *infra*, 1).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeal of California, Second Appellate District, Division 6, was entered on April 19, 1999. In response to a petition for rehearing, the Court of Appeal amended its decision without changing the judgment on May 18, 1999. The Supreme Court of California denied a Petition for Review on August 11, 1999 (App, *infra*, 78)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

California Civil Code Section 1950.5 (hereinafter "Section 1950.5") governs the taking and return of security deposits by landlords of residential apartments in California. The statute defines "security" that a landlord may demand of a residential tenant, limits and defines the purposes for which the landlord may retain security money after the tenant terminates, and provides a procedure obligating the landlord to return unclaimed security following the termination of the tenancy.[1] The statute also provides for additional statutory damages in the event a landlord claims or retains security in "bad faith."

Starting in 1974 and continuing until 1984, Respondents, (defendants in the state court below, and hereinafter referred to as "Islay") commenced a practice of charging a higher rent for the first month of their month-

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[1] Subsection (e) of Section 1950.5 read as follows at the time the suit was brought:

> (e) The landlord may claim of the security only such amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, exclusive of ordinary wear and tear, or to clean such premises, if necessary, upon termination of the tenancy. No later than two weeks after the tenant has vacated the premises, the landlord shall furnish the tenant with an itemized written statement of the basis for, and the amount of, any security received and the disposition of such security and shall return any remaining portion of such security to the tenant.

In a subsequent amendment the California Legislature indicated that "ordinary wear and tear" included the cumulative effect of ordinary wear and tear.

to-month tenancies than for the second and subsequent months. The California Supreme Court described the practice of defendants as follows:

> Defendants own or operate between 1200 and 1500 residential rental units in the Santa Barbara area. During the period relevant to this case, April 27, 1978, to April 27, 1981, it was defendants' practice to charge tenants an increased rental fee for the first 31 days of tenancy, but to charge a reduced fee for all subsequent months. Defendants never returned this fee in whole or in part; rather, they simply retained it as part of the rental payment for the first month. Approximately 10,000 tenants paid such fees during the relevant period, and the aggregate amount of such fees was approximately $1 million.

Granberry vs. Islay Investments, 9 Cal.4th 738 at 742, 38 Cal.Rptr.2d 650 at 652 (1995).

Under Islay's uniform practice, except in instances of deliberate vandalism, Islay did not seek to collect any money from their tenants for the cost of repairing routine damage, cleaning, or minor rent defaults following the termination of the tenancies, but instead Islay paid for such items out of their general revenue stream (which included the higher charge for the first month's rent). At no time during the pendency of the law suit did Islay ever provide any tenant affected by the practice with the notice required by Section 1950.5(e) indicating that Islay was seeking to deduct money from the higher charge of the first month's rent for cleaning, damage, or rent defaults allegedly owed by the tenant.

In 1981, Petitioners, all of whom are former tenants of Islay during the relevant period, brought suit on behalf of themselves and a similarly situated class of former and existing tenants, contending that the higher amount charged for the first month of each month-to-month tenancy was a "security" within the meaning of the statute and was therefore subject to refund by Islay under the procedural provisions of Section 1950.5. Petitioners sought a declaration that the extra first month's rental charge was a security, an accounting by Islay, and a refund of all security taken less only those amounts "properly" deductible under the statute.[2]

Islay answered the complaint but raised no issue that they sought any relief *against* any absent class member. Islay then moved for summary judgment and Petitioners moved for class certification. The trial court granted class certification and then granted Defendants' Motion for Summary Judgment on the ground that the definition of security in Section 1950.5 did not encompass any charge

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[2] Plaintiffs' Second Amended Complaint sought a declaration that "Defendants have an obligation within two weeks of the termination of the tenancy, to refund said surcharges to Plaintiffs and other past and present tenants, less only proper deductions allowed by Civil Code § 1950.5(e)." (JA I 740). In that same complaint plaintiffs' request for an accounting stated: "The amount of money due from Defendants [to plaintiffs and the class members] cannot be ascertained without an accounting of the amounts of security retained and the amounts of deductions actually made (if any) against such security within the time period provided by Civil Code § 1950.5(e)." (JA I, 747)

that the landlord had denominated as "rent" in its standard form rental agreement that each tenant was required to sign.

On appeal by Petitioners the California Court of Appeals reversed the grant of summary judgment and remanded the case to the trial court for a trial, holding that a security was any charge other than the "ordinary" rent charged for the unit. The appellate court further held that the determination of whether a charge was rent or security was not determined by what the landlord chose to call it, but was an issue of fact for the trial court to decide under all the facts and circumstances of the practice. *Granberry v. Islay Investments*, 161 Cal.App.3d 382, 207 Cal.Rptr. 652 (1984) (*"Granberry I"*).

Following remand, in 1986, defendants for the first time sought and obtained leave to amend their answer and cross-complaint, in each document alleging over 6,000 individual occupancy claims against members of the class, seeking damages for the failure to pay rent, for cleaning the units, and for repair of damage allegedly caused by the individual tenant class members. Petitioners objected to these amendments on the grounds that the claims raised individual fact issues for each class member, that Petitioners had no contact with the individual class members, and that Petitioners could not adequately defend the claims being raised against the individual class members. Petitioners' objections were overruled.

Islay then attempted service of the cross-complaint against some 6,000 individual class members by mere delivery to counsel for Petitioners. This purported service

was quashed by the trial court. Islay made no further attempt to serve any class member with their cross-complaint.

Notice of the pendency of the class action, which included a general statement that defendants were asserting offset claims against class members, was mailed to the last known addresses of the class members and published in the local Santa Barbara newspaper. Prior to the jury trial the trial court granted Petitioners' motion for summary adjudication dismissing the offset occupancy claims alleged in the answer for failure to comply with the notice provisions of Civil Code Section 1950.5. The trial court held that if the higher charge were determined to be a security under the statute, Islay's failure to follow the procedure for claiming a deduction from security as set out in Section 1950.5(e) prevented them from raising offset claims in the lawsuit brought to recover the refunds.

The case was tried before a jury in 1990, resulting in a jury verdict for Petitioners that the higher first month's rent was not ordinary rent but a security within the meaning of Section 1950.5. The jury found for Islay on petitioners' contention that Islay had acted in bad faith. After the trial, the trial court dismissed Islay's cross-complaint for occupancy claims against the individual class members for failure to serve any of the cross-defendants within three years of filing. California Code of Civil Procedure § 583.250.

Following the jury verdict, the trial court issued a class action judgment that included a "claims made remedy," i.e., one in which Islay would only refund the

security to those class members who were found and came forward to make a claim. Islay appealed from the trial court's grant of summary adjudication on their offset claims. Petitioners appealed from the remainder of the class action judgment.

The California Court of Appeal reversed the trial court's dismissal of Islay's offset claims but affirmed the trial court's grant of a "claims made remedy." The Court of Appeal opinion appears at *Granberry v. Islay Investments*, 23 Cal.Rptr.2d 420 (1993) (hereinafter *"Granberry II"*).

The California Supreme Court then granted Petitioner's Petition for Review to decide, *inter alia*, (1) whether Islay could assert offset claims against tenants when they had failed to follow the procedure for return of the security deposits set forth in Section 1950.5, and (2) whether the trial court's "claims made remedy" was an abuse of its discretion. On March 6, 1995 the California Supreme Court issued its decision in *Granberry v. Islay Investments*, 9 Cal.4th 738 (1995) (hereinafter *"Granberry III"*). The California Supreme Court found the failure to comply with the notice and return provisions of Section 1950.5 did not bar a landlord from asserting offset claims against a tenant when the tenant brought suit to recover the security held by the landlord. The California Supreme Court reversed the trial court's order of a "claims made remedy" and instructed the trial court on remand to follow the procedures set out in the then recently enacted California Code of Civil Procedure Section 384.

In the California Supreme Court, Petitioners had raised the contention that the offset claims against absent

class members could not be adjudicated in the trial court without giving actual notice to the individual class members, and that to attempt to adjudicate these claims based on the existing class action notice (by publication and mailing) would violate both federal and state due process requirements. In its opinion, without directly addressing the due process contention, the California Supreme Court stated that the original notice of pendency of class action, which had stated that offset claims might be brought, constituted sufficient notice to the absent class members. The state high court then instructed the trial court to *attempt* to fashion a method for determining the offset claims against absent class members as well as to make determinations on class-wide equitable defenses to the offset claims that the representative plaintiffs had asserted.

Petitioners filed a petition for certiorari with this Court, contending that by instructing the trial court to proceed with adjudication of the offset claims based on the former class action notice, the California Supreme Court was ignoring the due process problems inherent in adjudicating offsets without actual notice to the affected absent class members.[3] Islay filed a response to the petition for certiorari arguing that the petition was premature because the California Supreme Court had not reached the question of what was sufficient due process notice for adjudicating the offset claims. This Court denied the petition for certiorari.

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[3] Docket No. 95-122

On remand, the trial court issued an order providing for a second notice to the class, to be sent at Islay's expense by mail to last known forwarding addresses and to be published in local papers in Santa Barbara, Ventura and San Luis Obispo counties. (JA II 4526) Petitioners objected to the content of the proposed notice because it did not identify the persons against whom offset claims were being made, and to the fact that it was creating a second "claims made remedy." (JA II 4531)

On February 3, 1996, Petitioners filed a "Motion to Determine That Court is Without Jurisdiction To Adjudicate Defendants' Offset Claims," challenging the ability of the trial court to adjudicate the claims without giving actual notice of the individual claim to the affected absent class member and asserting that Petitioners could not be adequate representatives of absent class members for the defense of individual occupancy claims based on the particular circumstances of each individual tenancy. Petitioners contended that adjudication of the offset claims against absent class members based on the notice being given would violate both federal and state due process requirements. (JA II 4608). The matter was heard on March 15, 1996 and denied. (JA II 4773, RT 94-113).

Notice was mailed on March 29, 1996 to 5,386 class members (JA II 5067) and was published in newspapers in the three counties in mid-March, 1996. (JA II 5075, 5078, 5082). Of the mailed notices, 3,337, or 62%, were returned as undeliverable. (RT 514). In response to the mailing and publication, 112 claims were made, 36 of which were by persons who were not members of the class as defined, leaving 76 valid claims. (RT 521).

In hearings held in October and November of 1996, the trial court proceeded to adjudicate some 7,547 offset claims against non-appearing absent class members. Islay introduced records showing the cost of repairing damage, cleaning, and rental amounts unpaid at termination of each tenancy. Islay's operations manager testified that every apartment was rented in clean and "like new" condition, and that therefore any cleaning or repairs that had to be performed at termination were necessarily caused by the tenant. Petitioners presented the testimony of several class members against whom Islay had made claims for cleaning and damage. The class members testified that they had left the units in clean and undamaged condition, had given Islay their forwarding addresses, but had never been told that they owed any money for cleaning or repairs. This testimony was admitted for the limited purposes of showing that the trial court could not make the inference that because Islay had incurred costs for painting, carpeting, or other types of repairs or cleaning that it was necessarily the responsibility of the tenant, and to prove laches, waiver, and estoppel. Except for the 76 class members who made claims, the offsets were adjudicated against 7,471 class members without their appearing before the trial court and without any indication that they had actual notice of the suit, that they had knowledge that they were due a refund of the security they paid, or that they knew that Islay was asserting an offset claim against them that the Court was proceeding to adjudicate.

On November 21, 1996 the trial court issued a Memorandum of Intended Decision finding that "defendants

have suffered damages for unpaid rent, repairs and cleaning and that the amounts of the claims are reasonable." The court indicated it found no evidence sufficient to establish any equitable defense to Islay's claims. The Memorandum of Intended Decision did not set forth any dollar amounts that had been found for Islay. (JA II 5095).

Petitioners then filed a "Request for Statement of Decision" pursuant to California Code of Civil Procedure Section 632. On January 24, 1997 the trial court issued a Statement of Decision that contained two different figures ($2,483,000 and $1,800,000) for the aggregate amount of the offset claims that the trial court awarded Islay against individual absent members of the class.[4] (JA II 6045)

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[4] The lower figure represented that aggregate amount of "damages" actually shown by Islay's expense records. The higher figure came from testimony by an expert in the economics of residential rental operations as to the aggregate losses suffered by Respondent. The expert first added various categories of expenses that he surmised Islay must have incurred in addition to the amounts actually shown on their expense receipts. After increasing the aggregate damage amount, he then reduced it using mathematical formulas for estimating the "ordinary wear and tear" on the units. Under Section 1950.5, tenants are not required to pay for the cost of repairing the effects of cumulative or individual ordinary wear and tear on the premises. The expert's testimony was not based on the facts of any individual offset claim – he acknowledged that he knew no facts about the condition of any individual unit either before the tenancy or after it. Because the Respondents were pursuing offset claims, they could not obtain relief on an claim greater than the amount of security refund and interest due the individual tenant. The trial court calculated the class recovery using the lower figure, i.e., the figure that did not make allowance for ordinary wear and tear.

Petitioners proposed to the Court that the residue of unclaimed funds awarded to individual class members *after deduction in full of every offset claim raised by Islay* should be paid over the State Controller, who by statute has the permanent responsibility to attempt to find and pay the funds to the plaintiff class members who could not be located.[5]

On May 15, 1997 the trial court issued its "Class Action Judgment After Remand." Pursuant to California Code of Civil Procedure Section 384 it found that, after deduction of all individual offset claims from the individual amounts of security and interest due each class member, there remained a fund residue of $1,025,602, assuming all class members had made claims. The trial court then found that, after payment of $9,491 in claims and payment of 25% of the fund in attorney's fees, all remaining unclaimed money should revert to Islay unconditionally, thereby extinguishing all rights of absent class members to recover the security money that had been determined to be owed to them. The trial court's rationale for the reversion order was that Islay had acted "in good faith" and that to force them to pay over to the State Controller any of the unclaimed residue would only serve to "punish" Islay unnecessarily.

Petitioners once again appealed to the California Court of Appeal, raising the contentions, *inter alia*, that the adjudication of the offset claims against absent class

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[5] See the California Unclaimed Property Law, California Code of Civil Procedure, Sections 1500 *et seq. See especially,* California Code of Civil Procedure Sections 1519.5 and 1540.

members violated federal and state due process protections,[6] and that the order of reversion constituted an unlawful taking of property belonging to the individual absent class members in violation of their federal due process rights under the Fifth and Fourteenth Amendments.[7]

The Court of Appeals issued its decision on April 19, 1999. (*Granberry IV*, App, *infra*, 39) In response to the contention that the trial court lacked jurisdiction over absent class members and that the adjudication of the offset claims constituted a violation of the federal due process rights of the absent class members, the Court of Appeals referred to the California Supreme Court decision in *Granberry III*, holding that it was the law of the case on those issues. (*Granberry IV*, App, *infra*, 45-46) The Court of Appeals did not directly address Petitioners' contention that the reversion order was an unlawful taking in violation of the Fifth and Fourteenth Amendments, but simply ruled that it was within the equitable discretion of the trial judge to return the unclaimed portion of the judgment to Islay unconditionally and extinguish the

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[6] Petitioners argued in Headnote II of their Appellants' Opening Brief that the trial court had failed to establish jurisdiction over the absent class members for purposes of adjudicating the offset claims against them; that the class representatives could not adequately represent individual class members in defense of their individualized and fact dependent offset claims, and that both the manner of notice and the notice contents failed to satisfy federal due process standards under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and its progeny.

[7] Appellants' Opening Brief, Footnote 4, p. 18.

absent class members' rights in the fund, since the trial court had found that paying the funds over to the State Controller (to act as an agent with a permanent duty to find and pay over the residue to the class members) would result in "punishing" Islay. (App, *infra*, 49)

REASONS FOR GRANTING THE WRIT

Question 1.

In this litigation the California state courts adjudicated over 7,000 claims against individual members of a plaintiffs' consumer class action with the affected class members absent from the court and without the court providing them actual notice, or published or constructive notice, in accordance with the California statutory procedures for obtaining jurisdiction.

The state courts were repeatedly advised by Petitioners that although they were adequate representatives for the absent class members for purposes of proving that Islay had improperly taken and retained security deposits in violation of Section 1950.5, they were *not adequate representatives* to defend the thousands of individual offset claims arising out of alleged damage and cleaning necessitated by the unreasonable use of the apartments by the individual tenants.[8]

[8] Section 1950.5 permits the landlord to retain security only to cover damage to the unit "in excess of ordinary wear and tear." The term "ordinary wear and tear" includes the cumulative effect of ordinary wear and tear over the course of multiple tenancies. Thus the landlord cannot collect for the cost

The California courts have held that the notice of the pendency of the class adjudication of the Petitioners' claims relating to the uniform conduct of Islay was sufficient to give the courts jurisdiction over the absent class members for the unique and individualized claims raised by Islay, by which Islay sought to reduce or eliminate the amount due to each class member.

The California Courts have ignored Petitioners' repeated protestations that the absent class members lacked adequate representation for purposes of defending individual offset claims and that, where adequate representation was lacking, the state court could not adjudicate such claims consistent with due process where the affected parties had been given only the attenuated notice usually provided to class action members following this Court's decision in *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732, (1974) *ie.*, limited publication and mailing to last known addresses.

In *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), this Court first set forth the due process requirements for notice to absent *but represented* parties in a lawsuit affecting the

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of all repairs and cleaning, but only repairs and cleaning necessitated by use of the unit beyond ordinary wear and tear. The landlord's claim is thus predicated upon demonstrating the specific state of the unit at the commencement of the tenancy and at its conclusion, in order to demonstrate that the landlord incurred costs for the repair of unreasonable use by the tenant. The landlord may not collect for the cost of refurbishing carpets, drapes, etc. merely because they are old and have not been replaced in a long time. Each offset claim for repairs or damage was thus an individualized, specific, fact-dependent claim.

absent parties' interests. In *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) this Court stated the duty of the state to implement the requirements of *Mullane* before depriving citizens of their property.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) this Court discussed extensively the difference between the burdens placed upon a defendant brought into a distant court and the burdens placed on an absent member of a plaintiff class. Crucially, the Court noted:

> absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. *They are almost never subject to counterclaims or cross-claims,* or liability for fees or costs. Absent plaintiff class members are not subject to coercive or punitive remedies. *Nor will an adverse judgment typically bind an absent plaintiff for any damages,* although a valid adverse judgment may extinguish any of the plaintiff's claims which were litigated.

(*Ibid.*, at 810, emphasis supplied). The *Shutts* Court then concluded:

> [T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940).

(*Ibid.*, at 811-812)[9]

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[9] See also *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961), affirming one part of the judgment in the government anti-trust action because the

The patent inability of the representative plaintiffs to adequately represent the absent class members on the defense of the individual occupancy claims leaves the adjudication of those occupancy claims by the trial court as fatally lacking basic due process protections.[10] The provision of an *Eisen* type notice could not satisfy the due process void resulting from the absence of adequate representation. Without adequate representation by the class representatives, the judgments rendered against the class members in absentia are void.

By awarding Islay' affirmative individualized tenant claims against unrepresented absent class members, this case raises the issue of whether a state may disregard the *Mullane/Mennonite* mandates and attempt to shield their action from review by an unreviewed, unpublished, intermediate appellate court decision.

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named party could adequately represent the absent members of the class on external affairs of ASCAP, but reversing the other part of the judgment on the consent decree because the named party did not adequately represent absent members on the internal affairs of ASCAP.

[10] In the state courts Islay vigorously argued that Petitioners had incorporated within the scope of their own class claims the issue that Respondents were entitled to have their offset claims adjudicated against individual tenants, and that Petitioners should not be permitted to change their position in mid-stream. Petitioners have denied and continue to deny that they ever claimed they could adequately represent individual class members on the individual offset claims. However, even assuming, *arguendo*, that Petitioners had at one time included the offset claims within the scope of class proceedings, their statements could not eliminate the due process problem created by Petitioners' inability to provide adequate representation on the offset claims.

By refusing to acknowledge that Petitioners could not adequately represent their absent class members in defending the individual claims, and adapting their class action procedures accordingly, the state courts have blatantly ignored this Court's repeated warnings as to the limitations placed upon state court class action proceedings by the due process clause of the Fifth Amendment and the Fourteenth Amendment to the United States Constitution.

In this Court's recent decision in *Ortiz v. Fibreboard Corporation*, ___ U.S. ___, 119 S.Ct. 2295 (1999) the Court reiterated the risk of due process violations arising from the attempt by trial courts to resolve large numbers of individualized claims through "class" procedures where the absent class members lack adequate representation. What the Court said in *Ortiz* regarding mandatory settlement classes applies with equal force to the adjudication of offset claims *against* absent individual class members of a plaintiffs' class, since such claims

> implicate the due process "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22 (1940), it being "our 'deep-rooted historic tradition that everyone should have his own day in court,' " *Martin v. Wilks*, 490 U.S. 755, 762, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)); see *Richards v. Jefferson County*, 517 U.S. 793, 798-799, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). Although

> " '[w]e have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,' " or "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate," *Martin*, supra, at 762, n. 2, 109 S.Ct. 2180 (citations omitted), the burden of justification rests on the exception.

In this litigation the California state courts have failed to articulate why the desire to provide a "manageable" procedure for letting the landlord assert offset claims justifies an exception to honoring the due process rights of absent class members.[11]

In *Granberry III*, the California Supreme Court ignored Petitioners' warnings that adjudicating offset claims against the absent class members based on a mere notice of pendency of plaintiffs' class action would violate the due process rights of the absent class members. When Petitioners sought certiorari here to resolve that issue, Islay argued in their brief that the issue was not ripe because the California Supreme Court had not addressed the issue and that the adequacy of the notice

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[11] In *Granberry III*, the California Supreme Court characterized the due process problems arising from adjudicating the offsets against the class members in absentia as an "inconvenience": "it is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen." *Granberry III* at 749.

could not be addressed until the trial court had fashioned a procedure for adjudicating Islay's offset claims.

The trial court's response to Petitioners' contention that it could not obtain jurisdiction to adjudicate claims *against* absent class members based on an *Eisen* form of notice was to order a second *Eisen* form of notice that was patently inadequate both in its method of delivery and in its content.

In its unpublished opinion in *Granberry IV*, the California Court of Appeals has now held that the California Supreme Court *did* address the due process issue in *Granberry IV* and ruled that a simple pendency of class action notice delivered by publication and mailing to last known addresses satisfied due process, even where the class representatives could not adequately represent the absent class members in defense of the individual claims. The California Supreme Court denied review, thereby indicating that the Court of Appeal's interpretation of its opinion in *Granberry IV* is correct, to wit: that a trial court may adjudicate affirmative claims against absent class members based on a simple published notice of pendency of class action without consideration as to whether the named plaintiff representatives have the capacity to adequately represent the absent class members on their affirmative claims.

It is now apparent that the California state courts have a green light to entertain and adjudicate claims raised by defendants against absent class members in plaintiff class actions without affording the absent class members the due process protections available to any

normal party in a California state court against whom an affirmative claim is raised.

This petition therefore implicates not only the due process rights of the 7,000+ who have unknowingly lost their right to a refund of their security deposits through an adjudication held without providing them actual notice or an opportunity to be heard, and with no one present in the court with the ability to adequately represent their interests, but also the due process rights of all potential class members in class action litigation in California from hereon out. Affirmative claims, whether by offset or cross-complaint, are an effective method for defeating or defusing the monetary impact of a plaintiff class action. If such claims can be raised and litigated by default because the courts need not provide the absent class members the basic protections afforded all other parties to litigation, then it is obvious that similar proceedings will be occurring with regularity in the future.

Question 2.

The order of reversion constitutes an untrammeled exercise of discretion by a trial court stripping individuals absent from the court of their property interest in a judgment at law – in effect giving class members' property to another party who has made no legal claim for the money involved. The order of reversion gives back to Islay the money that the trial court had determined Islay owed to individual absent class members *after* the trial court had awarded Islay 100% of their claim.

Neither the trial court nor the California Court of Appeal could identify a legal basis for extinguishing the

rights of the absent class members in their judgment. Instead, the Court of Appeal approved of the trial court's exercise of an unlimited "equitable" discretion to reverse its own judgment so as not to "punish" Islay.

This Court has recognized that the absent class members are "equitable owners" of their pro-rata share of the common fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481-82, n. 7, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). The residue which is the subject of the reversion order is not the property of Islay but the property of the absent class members. The effect of the reversion order was to transfer the equitable ownership of the fund from the absent class members to Islay.

The state court's exercise of an "equitable" discretion to strip the absent class members of their rights to the residue in the fund represents an utterly lawless action – a blind preference for the interests of Islay over the established property interests of the absent class members in the unclaimed residue. As noted by Justice Breyer in his concurring opinion in *BMW Of North America, Inc., v. Gore*, 517 U.S. 559, 586-587, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), an arbitrary deprivation of property arises when a trial court acts without legal standards that provide "reasonable restraints" on the exercise of discretion.

> Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.

Id.

No legal standard informed the trial court's decision to give the money due to absent class members back to Islay unconditionally, rather than to give it to a party charged with a permanent duty to pay it to absent class members who could be found.

To Petitioners' knowledge, no published decision has *ever* held that the equitable power of a court in a class action proceeding could properly order the residue of a class action judgment representing individual liquidated amounts due to absent class members returned, unconditionally, to a defendant judgment debtor who had no legal claim to the funds. See, e.g., *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (CA9 1990), *Van Gemert v. Boeing*, 739 F.2d 730 (CA2 1984).

Where the basis for the judgment is equitable in nature, as for instance in the case of a back-pay award to a class of unidentified persons subjected to unlawful employment discrimination, return of unclaimed funds would be within the equitable discretion of the trial court. However, where the basis for the judgment is a determination that money paid over by the absent class member is due back to the class member as a matter of legal right, and that the defendant has a lawful debt to the class member, the trial court's "equitable" decision to extinguish the debt is nothing more than an unlawful taking of property without due process of law or just compensation. Since this taking took place in the absence of any notice to absent class members, the taking is a violation both of the substantive and the procedural due process rights of absent class members under the Fifth

and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Petitioners respectfully urge the Court to grant certiorari in this matter.

Respectfully submitted,

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(Cite as: 9 Cal.4th 738, 889 P.2d 970, 38 Cal.Rptr.2d 650)

Lisa GRANBERRY et al., Plaintiffs and Appellants,

v.

ISLAY INVESTMENTS et al., Defendants and Appellants.

No. S035591.

Supreme Court of California, In Bank.

March 6, 1995.

Rehearing Denied April 20, 1995.

Hill, Schwartz & Stenson, David H. Schwartz, Michael P. Guta and Ernest L. Graves, San Francisco, for plaintiffs and appellants.

Daniel E. Lungren, Atty. Gen., Roderick E. Walston, Chief Asst. Atty. Gen., and Yeoryios C. Apallas, Deputy Atty. Gen., as amici curiae on behalf of plaintiffs and appellants.

Diane M. Matsinger, Betty L. Jeppesen, Antonio R. Romasanta, Santa Barbara, Crahan, Javelera, Ver Halen & Aull and Marcus E. Crahan, Jr., Los Angeles, for defendants and appellants.

MOSK, Justice.

An important provision of our statutory landlord-tenant law provides that within three weeks after the termination of tenancy a landlord must return the security deposit paid by a former tenant and provide a written accounting of any portion retained as compensation for unpaid rent, repairs, and cleaning. (Civ.Code,

§ 1950.5, subd. (f).)[1] We granted review to determine whether a landlord who in good faith fails to comply with the requirements of this statute may nevertheless recover damages for unpaid rent, repairs, and cleaning in a subsequent judicial proceeding. We also consider whether the trial court abused its discretion by not requiring defendants to disgorge all security deposits received from the members of the plaintiff class and to pay this money into a fund. Finally, we consider whether the court abused its discretion by limiting the award of attorney fees and costs to 25 percent of the total class recovery.

We conclude that a good-faith failure to comply with section 1950.5, subdivision (f), does not bar a landlord from recovering damages for unpaid rent, repairs, and cleaning, and we agree with the Court of Appeal to the extent that it so held. We disagree with its view of the remaining issues, however, and hence reverse its judgment to permit the trial court to reconsider its choice of remedy and limitation on attorney fees.

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[1] At the time of the events in this case the statute allowed landlords only two weeks to act and the subdivision so providing was designated subdivision (e). The amendment changing the statute into its present form took effect on January 1, 1994. (Stats.1993, ch. 755, § 1.) The amendment is not material to the issues presented by this case.

All further statutory references are to the Civil Code unless otherwise specified.

FACTS

Defendants own or operate between 1200 and 1500 residential rental units in the Santa Barbara area. During the period relevant to this case, April 27, 1978, to April 27, 1981, it was defendants' practice to charge tenants an increased rental fee for the first 31 days of tenancy, but to charge a reduced fee for all subsequent months.[2] Defendants never returned this fee in whole or in part; rather, they simply retained it as part of the rental payment for the first month. Approximately 10,000 tenants paid such fees during the relevant period, and the aggregate amount of such fees was approximately $1 million.

Plaintiffs, a class of former tenants, sued for a refund of the amount by which the rent they had paid for the first 31 days of their tenancy exceeded the amount they paid in each of the following months. The court entered summary judgment in favor of defendants on the ground that the increased rent paid during the first month was in fact rent and not a security deposit within the meaning of section 1950.5, subdivision (b),[3] and therefore plaintiffs

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[2] The first month's rent exceeded the rent paid in subsequent months by approximately $100. (*Granberry v. Islay Investments* (1984) 161 Cal.App.3d 382, 385, fn. 4, 207 Cal.Rptr. 652.)

[3] Section 1950.5, subdivision (b) provides:

"As used in this section, 'security' means any payment, fee, deposit or charge, including, but not limited to, an advance payment of rent, used or to be used for any purpose, including, but not limited to, any of the following:

were not entitled to a refund. In an earlier appeal the Court of Appeal reversed, holding that the character of the payment was a triable issue of fact. (*Granberry v. Islay Investments, supra,* 161 Cal.App.3d 382, 207 Cal.Rptr. 652.) On remand, the court granted defendants leave to amend their answer to allege they were entitled to set off amounts owed to them for unpaid rent, repair, and cleaning if a jury were to find the increased rental payment was a refundable security deposit.

Plaintiffs subsequently moved for summary judgment on the question whether defendants were entitled to a setoff in view of the fact that they had failed to comply with the requirements of section 1950.5, subdivision (f). The court granted the motion. A jury thereafter found that the excess rental payments were security deposits within the meaning of section 1950.5, subdivision (b), but that defendants had not retained them in bad faith. The court ruled that the excess fees must be refunded to the members of the class who made individual claims, but it

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"(1) The compensation of a landlord for a tenant's default in the payment of rent.

"(2) The repair of damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or by a guest or licensee of the tenant.

"(3) The cleaning of the premises upon termination of the tenancy.

"(4) To remedy future defaults by the tenant in any obligation under the rental agreement to restore, replace or return personal property or appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized to be applied thereto by the rental agreement."

did not require defendants to disgorge the aggregate amount of the security deposits they wrongfully retained and to pay that money into a fund. The judgment also awarded costs and attorney fees to plaintiffs, but provided that such items would be recovered from the aggregate amount paid by defendants and would not exceed 25 percent of the total amount claimed by the individual members of the class.

In a second appeal the Court of Appeal held (1) the trial court erred in ruling that defendants were not entitled to a setoff, (2) the court did not abuse its discretion in granting refunds only to those class members who came forward to claim them, and (3) it was not an abuse of discretion to limit the award of attorney fees and costs to 25 percent of the total amount paid to the class. Although the Court of Appeal purported to reverse the judgment in its entirety, it in fact impliedly affirmed the judgment as to the second and third of these issues.[4]

I.

During the three-year period relevant to this litigation, plaintiffs vacated apartments rented from defendants but did not receive a written accounting of the basis for, or the amount of, the security deposits retained or the disposition of these security deposits. Nor did

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[4] The Court of Appeal also held that the trial court erred in failing to award prejudgment interest to plaintiffs and that the jury instruction defining the words "bad faith" was not erroneous. Because these holdings were not addressed in the petition for review, we need not discuss them further. (Cal.Rules of Court, rule 29.3(c).)

plaintiffs receive a refund of any portion of their security deposits. Accordingly, both the trial court and the Court of Appeal correctly concluded that defendants failed to comply with section 1950.5, subdivision (f). The issue now before us is whether, notwithstanding their good-faith lack of compliance, defendants may set off amounts allegedly due for unpaid rent, repairs, and cleaning against money due plaintiffs as a refund of their security deposits. We conclude that defendants may do so.

The English chancery courts allowed setoff to be raised as a defense as early as the 17th century. (*Prudential Reinsurance Co. v. Superior Court* (1992) 3 Cal.4th 1118, 1124, 14 Cal.Rptr.2d 749, 842 P.2d 48; 3 Story, Commentaries on Equity Jurisprudence (14th ed. 1918) § 1867, pp. 468-469; *see also Tigar, Automatic Extinction of Cross-Demands: Compensatio from Rome to California* (1965) 53 Cal.L.Rev. 224 [tracing the history of setoff to the Roman law concept of compensatio].) It was founded on the equitable principle that "either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled only to the net difference, . . . " (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 362, 113 Cal.Rptr. 449, 521 P.2d 441.) Setoff, as it applies to this case, is now codified as section 431.70 of the Code of Civil Procedure, which provides in pertinent part: "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated for so far as they equal each other, . . . " The quoted statute,

however, does not create a substantive right to raise setoff as a defense to a claim for monetary relief, but merely describes the procedures to be followed in raising this defense. (*Kruger v. Wells Fargo Bank, supra,* 11 Cal.3d 352, 362, 113 Cal.Rptr. 449, 521 P.2d 441; *Hauger v. Gates* (1954) 42 Cal.2d 752, 755, 269 P.2d 609.) To determine whether setoff is available in this case, we must turn to section 1950.5.

We first consider whether to allow a landlord to raise setoff even though he has failed to comply with the requirements of section 1950.5, subdivision (f), is consistent with the legislative intent underlying that statute. (*See Prudential Reinsurance Co. v. Superior Court, supra,* 3 Cal.4th 1118, 1125, 14 Cal.Rptr.2d 749, 842 P.2d 48.) "In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008, 239 Cal.Rptr. 656, 741 P.2d 154.)

Section 1950.5, subdivision (e), allows a landlord to claim any portion of the security deposit reasonably necessary to compensate for unpaid rent, repairs, and cleaning. Section 1950.5, subdivision (f), provides in pertinent part: "Within three weeks after the tenant has vacated the premises, the landlord shall furnish the tenant . . . a copy of an itemized statement indicating the basis for, and the amount of, any security received and the disposition of

the security and shall return any remaining portion of the security to the tenant." From the plain language of the statute we conclude that a landlord (1) must return a tenant's security deposit within the specified period after the termination of the tenancy, (2) may retain all or part of the security deposit as compensation for unpaid rent, repairs, and cleaning, and (3) must provide a written accounting of any amounts retained within the specified period. If, within the specified period, the landlord has not provided the tenant with a written accounting of the portion of the security deposit he plans to retain, the right to retain all or part of the security deposit under section 1950.5, subdivision (f), has not been perfected, and he must return the entire deposit to the tenant. Nevertheless, the mere fact that the landlord has lost the right to take advantage of the summary deduct-and-retain procedure of section 1950.5, subdivision (f), does not lead to the conclusion that he has lost all right to claim damages for unpaid rent, repair, and cleaning, whether through setoff or otherwise. The language of section 1950.5, subdivision (f), offers no clear guidance on this issue. Accordingly, we must look to the legislative history of section 1950.5 to determine the intent of the Legislature on this point. (*People v. Woodhead, supra,* 43 Cal.3d 1002, 1008, 239 Cal.Rptr. 656, 741 P.2d 154.)

In 1970, the Legislature enacted section 1951, the predecessor of section 1950.5. Former section 1951, subdivision (c), provided: "The landlord may claim of such payment or deposit only such amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, or to clean such premises upon termination of the tenancy, if the payment or deposit is made for any or all

of those specific purposes. Any remaining portion of such payment or deposit shall be returned to the tenant no later than two weeks after termination of his tenancy." (Stats.1970, ch. 1317, p. 2453.) Ostensibly, the Legislature enacted section 1951, subdivision (c), to prevent the misuse of security deposits, which one contemporary commentator described as follows: "Theoretically, the security deposits are created to insure against the contingencies of unpaid rents, tenant-inflicted damages, and unclean premises at the termination of the lease. Any claim as to the retention of these funds by the landlord arises only at such time as there has been a breach of the tenant's obligation and an assessment of damage. However, the security deposit in actuality has evolved into a bonus to be kept by the landlord upon termination of the lease agreement regardless of the damages actually sustained by the landlord. Landlords will retain security deposits after the departure of a tenant secure in the knowledge that a former tenant is severely inhibited from initiating legal action. This restraint is a product of a combination of factors including problems of proof, the relatively small sum of money at issue, the time factor, and the distance now separating the tenant from his former landlord. Where the reimbursement is forthcoming, usually the payments are delayed, the application of the retained amounts unitemized, and the interim retention and use of the funds having been without cost to the landlord." (Jory, *The Residential Lease: Some Innovations for Improving the Landlord-Tenant Relationship* (1971) 3 U.C.Davis L.Rev. 31, 38-39, fns. omitted; *see also* Bosshardt, *The Rental Security Deposit in California* (1971) 22 Hastings L.J. 1373.) In 1972, the Legislature renumbered section 1951 as section 1950.5, but did not change the

wording of subdivision (c). Finally, in 1977, the Legislature enacted the version of section 1950.5 in effect during the events of this case (now section 1950.5, subdivision (f)).

From the foregoing history it is apparent that section 1950.5, subdivision (f), was enacted to ensure the speedy return of security deposits on the termination of tenancy and to prevent the improper retention of such deposits. However, like the Court of Appeal, we find no conclusive evidence in the legislative history of section 1950.5 regarding the specific issue we now address – namely, whether a landlord may recover damages for unpaid rent, repair, and cleaning even if he has failed in good faith to avail himself of the summary deduct-and-retain procedure permitted under section 1950.5, subdivision (f).

Defendants note that the original draft of a bill proposed in 1985 would have added language to section 1950.5 specifically denying offsets for landlords that fail to comply with section 1950.5, subdivision (f), but this language was deleted from the bill prior to enactment. They contend that this proves that the Legislature, at least in 1985, intended to allow offsets. In response, plaintiffs note that defendants urged the passage of two bills, one in 1990 and another in 1991, but that these bills also failed. Again like the Court of Appeal, we find these arguments unpersuasive. As we have often observed, "Unpassed bills, as evidences of legislative intent, have little value." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1396, 241 Cal.Rptr. 67, 743 P.2d 1323; accord, *Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 922-923, 16 Cal.Rptr.2d 226, 844 P.2d 545.)

Defendants also remind us that we should construe section 1950.5, subdivision (f), in a way that will give effect to section 1950.5 as a whole, leaving no part useless or deprived of meaning. (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 478, 156 Cal.Rptr. 14, 595 P.2d 592.) They draw our attention to section 1950.5, subdivision (k), which provides in pertinent part: "The bad faith claim or retention by a landlord . . . of the security or any portion thereof, in violation of this section . . . , may subject the landlord . . . to statutory damages of up to six hundred dollars ($600), in addition to actual damages. . . . In any action under this section, the landlord . . . shall have the burden of proof as to the reasonableness of the amounts claimed. . . . "[5] According to defendants, this provision is "critical" for two reasons. First, they argue that if the Legislature had intended to bar all claims for damages for unpaid rent, repair, and cleaning other than those made in accordance with section 1950.5, subdivision (f), it would not have been necessary to allocate the burden of proof regarding reasonableness, because the matter would never be litigated. According to defendants, this provision could only have meaning in cases in which the landlord has failed to comply with section 1950.5, subdivision (f), the tenant has sued for a refund, and the landlord seeks setoff. The argument misses the mark: the second sentence of section 1950.5, subdivision (k), would also apply in cases in which the tenant contests the accounting required under

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[5] Prior to the 1993 amendments (*see* fn. 1, ante) this subdivision was designated subdivision (h), and the penalty for bad faith was $200 rather than $600.

section 1950.5, subdivision (f), and sues for a refund of all or part of the amount deducted and retained under that provision.

Second, defendants contend that because the Legislature provided a remedy only for bad faith retention of a security deposit, we can infer it did not intend to impose a penalty for good faith retention. They conclude that landlords like themselves that have retained security deposits in good faith should not be penalized by being barred from raising setoff. This argument is persuasive. "[I]t is well settled that ' "Courts will not impose penalties for noncompliance with statutory provisions in addition to those that are provided expressly or by necessary implication.' " [Citations.]" (*People ex rel. Van de Kamp v. American Art Enterprises, Inc.* (1983) 33 Cal.3d 328, 334, 188 Cal.Rptr. 740, 656 P.2d 1170.) Because the Legislature has not expressly stated that landlords that fail to comply with section 1950.5, subdivision (f), in good faith are barred from recovering for unpaid rent, repairs, and cleaning, we find that no such penalty was intended and we will not imply such a penalty.

Plaintiffs vigorously contend this result is inconsistent with principles of equity and with public policy. (*See Prudential Reinsurance Co. v. Superior Court, supra,* 3 Cal.4th 1118, 1139, 14 Cal.Rptr.2d 749, 842 P.2d 48 [considering principles of equity and public policy in determining whether setoff was available].) They first urge that to allow landlords to raise setoff as a defense would be inconsistent with the equitable principle that an individual should not profit from his own wrong, because landlords may use this defense to keep all or part of the security deposits they retained in violation of section

1950.5, subdivision (f). While we recognize the importance of this equitable principle (*see* § 3517), and while we do not doubt that this principle may bar setoff on the particular facts of many individual cases, it does not justify an absolute bar to the right to a setoff in all cases.

When enacting, interpreting, or applying a rule of law that regulates the interaction between individual citizens, the lawmaking body should consider carefully before creating absolute and invariable rules. Normally, such laws should be as flexible as the regulated interactions are varied, and they should leave the courts with some discretion to apply them justly given the facts of the case before them. (*See* Heriot, *A Study in the Choice of Form: Statutes of Limitations and the Doctrine of Laches*, 1992 B.Y.U.L.Rev. 917, 920 ["In promulgating any kind of law, one of the tasks a lawmaker must perform is to select the best formulation of that law – the one that delegates to the law administrator the level of discretion and authority that is just right."].) Without some degree of flexibility, harsh and improper results may occur. (*See id.* at p. 937, fn. omitted [Comparing strict rules, like statutes of limitations, to more flexible standards, like the doctrine of laches, and asserting that as lawmakers move toward more rigid rules, "there is an increasing potential for incorrect judgments – judgments that would not reflect the lawmaker's preferences had the lawmaker adjudicated the case personally on an all-things-considered basis. . . . The rigidity of rules creates errors. [¶] . . . [A] rulelike statute of limitations will always be both underinclusive and overinclusive. . . . [and therefore] [i]t will never be a perfect reflection of its underlying policies."].) Such flexibility is particularly appropriate when applying

equitable doctrines, such as setoff. (*See, e.g., Holmberg v. Armbrecht* (1946) 327 U.S. 392, 396, 66 S.Ct. 582, 584, 90 L.Ed. 743 ["Equity eschews mechanical rules; it depends on flexibility."].)

In addition, a landlord that seeks setoff after good-faith noncompliance with the procedures described in section 1950.5, subdivision (f), does not "profit from his own wrong," because he cannot set off any damages he could not have recovered if he had complied with section 1950.5, subdivision (f). Indeed the landlord suffers a great deal if he delays, because he loses the opportunity to take advantage of the summary nonjudicial procedure allowed under that statute, and must instead prove in court by a preponderance of the evidence that he is entitled to damages and that the amount claimed is reasonable. (§ 1950.5, subd. (k).) This burden of proof will become ever more difficult to sustain the longer the landlord delays, because the evidence supporting his claim may be lost with the passage of time.

Second, plaintiffs contend that to allow defendants to raise setoff would violate the equitable principle that an individual may not change his position to the detriment of another. (*See* § 3512.) They note defendants originally claimed (1) the excess payments were rent, (2) they had never demanded or received security deposits from plaintiffs, and (3) they, not plaintiffs, were to bear the cost of unpaid rent, repairs, and cleaning. Only after the excess payments were found to be security deposits did defendants claim they were entitled to a setoff. Plaintiffs argue this change of position worked to their detriment because they did not receive adequate notice of defendants' claims. However, the original class notice contained the

following paragraph: "Defendants contend that any refund you might be entitled to recover must be reduced by the amount of any unpaid rent, costs reasonably necessary to clean and repair damage you caused to the apartment, in excess of ordinary wear and tear, and that such sum could exceed the amount of any refund or damages you might receive." In light of this notice, plaintiffs' contentions regarding estoppel and lack of notice are unavailing.

Finally, plaintiffs contend that to allow setoff would be inappropriate in class actions such as this because of numerous practical difficulties. They stress that (1) the class is comprised of approximately 10,000 individuals, many of whom may have moved to other parts of the state or country, (2) defendants have raised between 6,200 and 8,000 claims for setoff, which must be litigated individually, (3) because the security deposits in question are between $100 and $150, a relatively small amount of money, many class members may not appear to oppose defendants' claims, and (4) if the class members do not appear, defendants will prevail by default on their claims for setoff, and may be unjustly enriched. Given these difficulties, plaintiffs ask us not only to bar defendants from raising setoff, but to reconsider our many earlier decisions holding setoff may be raised when the claims are not liquidated (*see, e.g., Erlich v. Superior Court* (1965) 63 Cal.2d 551, 555, 47 Cal.Rptr. 473, 407 P.2d 649; *Hauger v. Gates, supra,* 42 Cal.2d 752, 755, 269 P.2d 609), at least in the context of class actions. We decline to do so for two reasons. First, it may well be possible on remand to shape a remedy that will avoid many of the problems plaintiffs have identified. Second, it is inappropriate to deprive

defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen. (*See City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462, 115 Cal.Rptr. 797, 525 P.2d 701, fn. omitted ["Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going."].)

For the reasons stated, we conclude that a landlord who has failed in good faith to take advantage of the summary nonjudicial deduct-and-retain procedure allowed under section 1950.5, subdivision (f), may recover damages for unpaid rent, repairs and cleaning (§ 1950.5, subd. (e)) in a subsequent judicial proceeding provided that he proves by a preponderance of the evidence that he has suffered such damages and that the amount claimed is reasonable (§ 1950.5, subd. (k)).[6] The trial court erred in ruling to the contrary, and that court must now hold an evidentiary hearing to determine whether defendants have sustained this burden. Because defendants have raised their claims through the equitable defense of setoff, the trial court must also determine whether defendants' claims are barred by any of the generally applicable equitable affirmative defenses, including laches, unclean hands, and estoppel.

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[6] Because the jury did not find that defendants here acted in bad faith, we do not consider and therefore express no opinion regarding the rights of landlords who have acted in bad faith.

II.

Plaintiffs requested that judgment be entered on behalf of the entire class for the aggregate amount of the security deposits retained, and suggested that any amounts not ultimately claimed by individual class members should escheat to the state. The trial court rejected the request and entered judgment in favor of only those members of the class (excluding the named plaintiffs, whose claims were dealt with separately) who might actually come forward and file individual claims. In doing so, the court issued a memorandum of intended decision stating in pertinent part: "In certain consumer class actions Fluid Recovery may be the best method of compensating the class. The propriety of Fluid Recovery in a particular case depends upon its usefulness in fulfilling the purposes of the underlying cause of action. (*See State v. Levi Strauss and Company* [1986] 41 Cal.3d 460 [224 Cal.Rptr. 605, 715 P.2d 564.].) We do not find that the Fluid Recovery method is necessary to fulfill the purposes of this case."[7] Plaintiffs now contend that the trial

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[7] The term "fluid recovery" refers to the application of the equitable doctrine of cy pres in the context of a modern class action. (*State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472, 224 Cal.Rptr. 605, 715 P.2d 564.) "The implementation of fluid recovery involves three steps. [Citation.] First, the defendant's total damage liability is paid over to a class fund. Second, individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof. Third, any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts." (*Id.* at pp. 472-473, 224 Cal.Rptr. 605, 715 P.2d 564.)

court abused its discretion by denying the remedy they requested.

"The class action is a product of the court of equity – codified in section 382 of the Code of Civil Procedure. It rests on considerations of necessity and convenience, adopted to prevent a failure of justice." (*City of San Jose v. Superior Court, supra,* 12 Cal.3d 447, 458, 115 Cal.Rptr. 797, 525 P.2d 701.) In 1994 the Legislature amended Code of Civil Procedure section 384, providing guidelines for the courts to use in exercising their equitable discretion to shape class remedies. Subdivision (b) of this statute declares that unless the defendant is a public entity or public employee, "prior to the entry of judgment in a class action . . . the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue, plus interest on that sum at the legal rate of interest from the date of the entry of the initial judgment, in any manner the court determines is consistent with the objectives and purposes of the underlying cause of action. . . . " In subdivision (a) of Code of Civil Procedure section 384, the Legislature explains that its intent in enacting the foregoing statute was "to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of

action, or to promote justice for all Californians." However, the Legislature makes it clear that nothing in the statute "shall . . . be construed to abrogate any equitable cy pres remedy which may be available in any class action with regard to all or part of the residue." (*Id.*, subd. (d).)

When the trial court chose the class remedy in this case, it had already held that defendants were not entitled to set off amounts owed for unpaid rent, repair, and cleaning. There can be little doubt that this prior ruling was among the more important factors that the trial court considered in deciding what remedy would be most equitable given the circumstances as they then existed. However, we now hold in part I of this opinion that the trial court's initial ruling was error, that defendants are not barred as a matter of law from seeking setoff, and that they are entitled to have the opportunity to prove their right to setoff at an evidentiary hearing. It follows that the equities in this case may well have changed, and the trial court must reconsider its choice of remedy in light of the result of the forthcoming evidentiary hearing on defendants' claim of setoff.

III.

The judgment provided in part that "Plaintiffs shall recover legal costs in the amount of $___ [to be hereafter determined by the court]. Plaintiffs' counsel shall recover reasonable attorneys' fees in an amount to be hereafter determined by the Court. Such court costs and attorneys' fees shall be paid out of and deducted from any aggregate amount of money paid by Islay under this judgment

as the refund of rent for the first 31 days of a tenancy (when compared with the rent for the second and subsequent months of the tenancy). Pursuant to the notice given potential class members, such court costs together with such attorneys' fees shall not exceed 25% of said aggregate amount."

Plaintiffs contend the 25 percent limitation on attorney fees was an abuse of discretion because the court failed to obtain and consider evidence regarding the number of hours class counsel devoted to the litigation, counsel's normal hourly rates, counsel's experience, or the quality of the legal services provided. This contention is premature because it is impossible to determine whether attorney fees in the amount of 25 percent of the "aggregate class recovery" are adequate, given that (1) the amount of defendants' offsets, if any, have not yet been calculated, and it is therefore impossible to determine what the total class recovery will be, if anything, and (2) this case is far from over, and it is therefore impossible to determine the total number of hours class counsel will devote to it prior to completion.

We have held, and we remain convinced, that an " 'experienced trial judge is the best judge of the value of professional services rendered in his court. . . . ' " (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49, 141 Cal.Rptr. 315, 569 P.2d 1303.) Accordingly, the trial court must reconsider the question of attorney fees after the forthcoming evidentiary hearing on defendants' claim of setoff.

The judgment of the Court of Appeal is reversed insofar as it impliedly affirms (1) that portion of the

judgment of the trial court which limits recovery to non-named class members who have not opted out and who file claims, and (2) that portion of the judgment which limits the amount of the award of costs and attorney fees. The Court of Appeal shall remand the cause to the trial court with directions to conduct further proceedings consistent with this opinion. In all other respects the judgment of the Court of Appeal is affirmed.

LUCAS, C.J., and GEORGE and WERDEGAR, JJ., concur.

BAXTER, Justice, concurring.

I concur in the majority's judgment and in its holding that a landlord's good faith failure to comply with the requirement of Civil Code section 1950.5, subdivision (f) for an accounting and return of a former tenant's security deposit does not bar the landlord from raising setoff as a defense in an action by a former tenant for the refund. (All further section references are to the Civil Code.)

I respectfully disagree, though, with the majority's premise that section 1950.5 is ambiguous on the question of whether setoff is allowed and that we therefore must construe the statute based on its legislative history. " 'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . . . ' " (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798, 268 Cal.Rptr. 753, 789 P.2d 934, quoting *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299.) I believe section 1950.5 is not ambiguous and that we need not construe it. Section 1950.5, subdivision (k) provides the sole remedies for a landlord's retention of a security deposit: "The bad

faith claim or retention by a landlord or the landlord's successors in interest of the security or any portion thereof in violation of this section, or the bad faith demand of replacement security in violation of subdivision (i), may subject the landlord or the landlord's successors in interest to statutory damages of up to six hundred dollars ($600), in addition to actual damages. The court may award damages for bad faith whenever the facts warrant such an award, regardless of whether the injured party has specifically requested relief. In any action under this section, the landlord or the landlord's successors in interest shall have the burden of proof as to the reasonableness of the amounts claimed or the authority pursuant to this section to demand additional security deposits." Nothing in the statute states or even suggests that the landlord who has acted in good faith loses his right to assert a setoff. Because section 1950.5 provides the remedies for a landlord's wrongful retention but does not even mention the loss of a landlord's setoff, the statute necessarily does not deprive the landlord of the setoff. This is not ambiguous.

ARABIAN, J., concurs.

KENNARD, Justice, dissenting.

The law requires that a landlord "shall" assert any claims against the security deposit of a tenant within a short period (formerly two, now three weeks) after the tenancy ends and "shall" within that period refund to the tenant any portion of the security that the landlord did not claim. (Civil Code, § 1950.5, former subd. (e), now subd. (f), italics added.) In breach of this statutory duty, the defendant landlord here illegally withheld more than

$1 million in security deposited by over 10,000 residential tenants without asserting any claim against the security. Nonetheless, in the name of "equity" the majority holds that the landlord may now, 14 to 17 years after the tenancies have ended, assert claims against the tenants' security for unpaid rent, cleaning expenses, and repair costs that the statute required the landlord to assert within 2 weeks of the end of each tenancy.

In its haste to embark on its meanderings along the byways of equity jurisprudence, the majority fails to recognize that the language and purpose of the statute preclude the result it reaches. The purpose of Civil Code section 1950.5's carefully calibrated provisions is to compel landlords to refund security due tenants promptly without the necessity of legal action by the tenants. To ensure that this occurs, the Legislature imposed the requirement that landlords make their claims against the security within the statutory period. The inescapable corollary of the landlord's mandatory duty to assert any claims within the statutory period is that after that period expires the landlord loses any further right to assert claims as setoff against the security.

The majority, however, holds that landlords who violate section 1950.5's requirement to set off and refund security within the statutory period may nonetheless later raise their claims as setoff against the security. I dissent because the majority's holding ignores the statutory language, disrupts the statutory scheme, and disserves the statute's purpose. Section 1950.5 will now become a toothless remedy.

Additionally, I would hold that the trial court abused its discretion in fashioning the class remedy. I agree with the majority, however, that the plaintiff class's objections to the attorney fee order are premature.

Plaintiffs Lisa Granberry et al. are a class of approximately 10,000 former tenants of defendants Islay Investments and its managing partner Marvin Trevillian (hereafter collectively the landlord). The class members were tenants of the landlord between 1978 and 1981. The landlord charged the tenants on average approximately $100 more for the first month of the tenancy than for each succeeding month of the tenancy.

Granberry filed this class action contending that the excess first month charge was a security payment within the meaning of Civil Code section 1950.5; the jury agreed. During the class period, class member tenants paid the landlord over $1 million in security in the form of excess first-month charges, which the landlord never refunded or accounted for upon the termination of the tenancies.

The landlord filed a cross-complaint against the class member tenants for amounts allegedly due for unpaid rent, cleaning, and repairs. The trial court dismissed the landlord's cross-complaint because it was not properly served. The landlord also sought to assert these same claims as setoff to the security the landlord had received from the class member tenants. The trial court ruled that because the landlord had not complied with Civil Code section 1950.5, former subdivision (e)'s requirement of accounting for and refunding security within two weeks of the end of the tenancy, the landlord was not entitled to set off any claims against the security.

After trial, the court entered judgment. The judgment limited the landlord's liability to the amount of security owed to those class members who might thereafter submit a claim, rather than imposing liability for the full amount of the security withheld from the class as a whole.

Reversing the trial court, the Court of Appeal held that the landlord was entitled to set off any claims against the security owed to the class member tenants. It also held that the trial court had not abused its discretion in fashioning a class remedy limiting the landlord's liability to only the security due to those class members who might thereafter submit a claim.

II

At the times relevant to this action, Civil Code section 1950.5, former subdivision (e) provided: "The landlord may claim of the security only such amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, exclusive of ordinary wear and tear, or to clean such premises, if necessary, upon termination of the tenancy. No later than two weeks after the tenant has vacated the premises, the landlord shall furnish the tenant with an itemized written statement of the basis for, and the amount of, any security received and the disposition of such security and shall return any remaining portion of such security to the tenant." (Civ.Code,

§ 1950.5, former subd. (e), italics added.)[1] This version of section 1950.5 subsection (e), applicable during the period from 1978 to 1981 relevant to this action, was enacted in 1977. (Stats.1977, ch. 971, § 2, p. 2939.) Thereafter, the Legislature amended section 1950.5 several times, extending the landlord's compliance period from two to three weeks and redesignating as subdivision (f) the second sentence of subdivision (e) containing the setoff-and-refund provision. Accordingly, I will hereafter refer to the setoff-and-refund provision as section 1950.5(f).

Section 1950.5 limits both the nature of the claims that a landlord may assert against the security and the time within which a landlord may assert those claims. Under the statute, within two weeks after a tenancy ends the landlord must assert any claims against the security and return any unclaimed amount.

The majority holds that, despite the landlord's statutory duty to assert any claim against the security and to refund the balance within two weeks of the end of the tenancy, a landlord who retains the entire security without complying with this duty may assert claims for the first time as setoff in a subsequent action by the tenant to recover the security. In my view, this holding is inconsistent with the language and purpose of section 1950.5(f).

In analyzing statutory language, this court looks to "the object to be achieved and the evil to be prevented by the legislation." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159, 278 Cal.Rptr. 614, 805 P.2d

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[1] Unless otherwise noted, all further statutory references are to the Civil Code.

873.) As the majority acknowledges, section 1950.5(f) was designed to address the evil of landlords who fail to promptly return security due the tenant at the end of the tenancy. (Maj. opn., ante, at pp. 653-654, of 38 Cal.Rptr.2d, at pp. 973-974 of 889 P.2d.) Recognizing the obstacles facing a former tenant seeking to recover a security deposit from a recalcitrant landlord and the former tenant's lack of leverage over the landlord, the Legislature sought to level the playing field by in effect telling the landlord holding the security to "claim it or lose it."

The plain language of section 1950.5(f) requires a landlord within two weeks of the end of a tenancy to notify the tenant of any claims against the security and to return any portion of the security upon which the landlord has no claim. By strictly limiting the time within which a landlord can assert a claim against the security, the Legislature has necessarily provided that the landlord forfeits any right to set off claims against the security if the landlord does not do so within the statutory period.

This reading of section 1950.5(f) accords with its purpose. Section 1950.5(f) was designed to compel landlords to routinely return security due the tenant without the necessity of legal action. In the words of the majority, section 1950.5(f) "was enacted to ensure the speedy return of security deposits on the termination of tenancy and to prevent the improper retention of such deposits." (Maj. opn., ante, at p. 654 of 38 Cal.Rptr.2d, at p. 974 of 889 P.2d.) This purpose is furthered by requiring landlords to assert their claims against the security promptly after the end of the tenancy or else lose the right to do so thereafter.

Although a landlord loses all recourse against the security by failing to assert any claims within the statutory two-week period, this does not mean that the landlord has lost all recourse against the tenant. Nothing in section 1950.5(f) suggests that, by losing the right to set off claims against the security, the landlord has also forfeited any causes of action against the tenant. A landlord wishing to pursue those claims after allowing the statutory period to elapse may do so in an independent suit against the tenant. The landlord in this case did file a cross-complaint against the class members asserting claims for unpaid rent, cleaning costs, and repair costs; the cross-complaint was dismissed, however, when the landlord failed to properly serve it.

III

The majority hinges its conclusion that a landlord does not lose the right of setoff after the statutory period expires on the following reasoning. It first contends that to deny a continuing right of setoff to the landlord who fails to assert claims within the statutory period would impose a "penalty" on the landlord. It then contends that, because section 1950.5, subdivision (k) (hereafter section 1950.5(k)) authorizes $600 in statutory damages to be awarded against a landlord who in bad faith unlawfully retains security, the Legislature did not intend to "penalize" landlords who without bad faith unlawfully retain security by denying them the right of setoff.[2] I disagree

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[2] The amount of statutory damages available under section 1950.5 during the period relevant to this lawsuit was $200. (§ 1950.5, former subd. (h).)

both with the majority's characterization of the limitations period of the landlord's setoff right as a "penalty" and with its conclusion that the bad-faith-damages provision of section 1950.5(k) demonstrates an implicit intention by the Legislature not to terminate the landlord's right of setoff after the landlord has failed to assert any claims within the statutory period.

The majority is wrong in characterizing the expiration of the section 1950.5(f) limitations period as a "penalty." We do not commonly say that someone who has forfeited a claim by failing to bring it within the statute of limitations period has suffered a penalty. Under the majority's reasoning, however, every statute of limitations would be a penalty.

Nor is a limitations period for asserting claims (such as the limitation period of section 1950.5(f)) a "penalty" in the sense in which that word was used in the case on which the majority relies, *People ex rel. Van de Kamp v. American Art Enterprises, Inc.* (1983) 33 Cal.3d 328, 334, 188 Cal.Rptr. 740, 656 P.2d 1170. At issue there was a monetary fine, not a claims limitation period as is the case here. (*See ibid.*)

Furthermore, even if the complete loss of a claim resulting from the running of a limitations period could properly be characterized as a penalty, it would still be incorrect to characterize the expiration of the landlord's setoff right under section 1950.5(f) as a penalty. As explained above, the landlord whose setoff right under section 1950.5(f) lapses does not forfeit any claims against the tenant, which the landlord can still pursue in an

independent action against the tenant, but only loses the right to satisfy the claims out of the security.

Even assuming that the expiration of the landlord's right to setoff could be characterized as a penalty, it is one that arises " ' "by necessary implication" ' " (*People ex rel. Van de Kamp v. American Art Enterprises, Inc., supra,* 33 Cal.3d at p. 334, 188 Cal.Rptr. 740, 656 P.2d 1170) from the language of section 1950.5(f). As described above, the Legislature's imposition on landlords of a mandatory duty to assert any claims against the security within two weeks of the end of the tenancy necessarily implies that if landlords fail to do so within that period, they cannot do so later. To hold otherwise would render meaningless the mandatory term "shall" that the Legislature used in section 1950.5(f).

The majority is also wrong in concluding that, because section 1950.5(k) authorizes statutory damages for landlords who retain security in bad faith, the Legislature must have intended that landlords who, without acting in bad faith, unlawfully breach their mandatory duty to account for any claims against the security and to refund any remaining security should not lose the right of setoff after the statutory period expires. Section 1950.5(k) provides: "The bad faith claim or retention by a landlord . . . of the security or any portion thereof in violation of this section, . . . may subject the landlord . . . to statutory damages of up to six hundred dollars ($600), in addition to actual damages."

The Legislature's decision to impose a special consequence – statutory damages – for retention of security

that is accompanied by bad faith raises no logical inference that the Legislature intended to impose no consequence whatever for retention of security in violation of section 1950.5(f) not accompanied by bad faith. There is nothing logically inconsistent about imposing separate consequences for these different types of conduct. To the contrary, in light of the legislative purpose – to secure the prompt return of tenant funds to which the landlord has no legitimate claim – it is perfectly rational and consistent for the Legislature to have imposed, as it did, loss of setoff as the basic consequence for all retention of security beyond the statutory period, and to have imposed statutory damages as a second and additional consequence for a particularly aggravated form of statutory violation consisting of improper retention of security accompanied by bad faith.

Nor, unlike *People ex rel. Van de Kamp v. American Art Enterprises, Inc., supra,* 33 Cal.3d 328, 334, 188 Cal.Rptr. 740, 656 P.2d 1170, on which the majority relies, is this a case in which, because the Legislature has provided certain penalties or consequences for a statutory violation, the issue is whether the Legislature intended those remedies to exclude other penalties or consequences. *American Art* was a nuisance action in which the trial court had imposed upon the defendants a $168,000 fine not expressly authorized by the nuisance statute. (*Id.* at p. 334, 188 Cal.Rptr. 740, 656 P.2d 1170.) Because the Legislature had expressly authorized injunctive relief and the sale of the offending property as remedies for a nuisance, it was unlikely that the Legislature had impliedly authorized monetary fines as an additional punishment for the

same act. Here, however, in the majority's view the Legislature has provided no consequence for a violation of the mandatory setoff-and-refund requirement not accompanied by bad faith.

By permitting a landlord who has retained the entire security without timely asserting any claims to the tenant to nonetheless set off claims in an action by the tenant to recover the security, the majority's holding will render section 1950.5(f) a flimsy barrier against the evil it is designed to address – landlords who do not promptly account for any claims against the security and refund whatever security is due their tenants without the necessity of legal action by the tenant. The statutory requirements that the landlord "shall" assert claims against the security within two weeks by notifying the tenant and "shall" refund any remaining portion within two weeks are meaningless, and the purpose of the statute is frustrated, if the landlord who fails to do so can nonetheless assert those claims as setoff years later in an action by the tenant to recover the security. The carefully balanced incentives of section 1950.5, designed to ensure that landlords refund security routinely and without the necessity of court action, will accordingly be defeated.

IV

The trial court's class action judgment required the landlord to refund only the security withheld from those class member tenants who might thereafter submit a claim against the landlord. The majority reverses the portion of the Court of Appeal's judgment affirming the trial court's class action remedy without reaching the

issue of whether the trial court abused its discretion in fashioning that remedy. In order to provide guidance to the trial court on remand, I would reach that issue and hold that the trial court abused its discretion in ordering a class remedy that permits the landlord to retain class damages that are not claimed by individual class members.

The trial court's decision to limit the landlord's liability to only the amounts owed to those class members who may come forward and submit individual claims, rather than imposing liability for the full amount of unlawfully withheld security owed to the class as a whole, was an abuse of discretion, even assuming that the landlord should be permitted the right of setoff. In my view, allowing a wrongdoing defendant to retain all or part of the amount for which it is liable to the plaintiff class rarely is one of the options that a court should choose in deciding how to distribute the class recovery or dispose of the residual.

Initially, the trial court failed to distinguish between the separate issues of the determination of the amount for which a defendant is liable to the plaintiff class and the method for distribution of that amount to the class. Code of Civil Procedure section 384, cited by the majority, makes clear the distinction between the amount of a defendant's liability to the class and the method of distribution of the class recovery (including the disposition of any unpaid residual). It first requires that "prior to the entry of any judgment in a class action . . . the court shall determine the total amount that will be payable to all class members. . . . " (Code Civ.Proc., § 384, subd. (b), italics added.) Thereafter, "the parties shall report to the

court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue . . . in any manner the court determines is consistent with the objectives and purposes of the underlying cause of action. . . . " (*Ibid.*) Thus, the proper measure of the class recovery is the injury caused to the class members, not the amounts that individual class members step forward to claim.

The trial court erased the distinction between these two concepts by making the amount of the class recovery turn on the effectiveness of the distribution method it selected. Using the trial court's formula, by definition there would never be any unpaid residuals in class actions because defendants would never have any liability for any amounts not claimed by class members. By making the landlord liable only for the security withheld from those class members who step forward to claim a refund and not for the security withheld from the class as a whole, the trial court in effect narrowed the class without notice after the trial had concluded and extinguished the causes of action of the nonclaiming class members. Instead, the trial court should have first determined the landlord's total liability to the class as a whole and then developed a method for distributing that amount to the class members to the extent feasible and for dealing with any unclaimed residual.

A trial court has several sources of guidance in dealing with the unclaimed residual of a class recovery. As the majority acknowledges, the class action is a creature of equity, and it is a first principle of equity that a wrongdoer should not be permitted to profit from its

wrongs. (*See* § 3517 ["No one can take advantage of his own wrong."]; *see also* Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy* (1972) 39 U.Chi.L.Rev. 448 [retention of unclaimed residue by the defendant results in "unjust enrichment of the defendant"].) Consequently, this court has previously held that the various methods of distributing the unpaid residual of a class recovery that go under the name of "fluid recovery" may be "essential to ensure that the policies of disgorgement or deterrence are realized" and should be utilized where appropriate to "fulfill[ ] the purposes of the underlying cause of action." (*State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472, 224 Cal.Rptr. 605, 715 P.2d 564.)

The Legislature, in Code of Civil Procedure section 384, has expressly addressed the factors a trial court must consider in crafting a method for the disposition of the unclaimed residual of a class recovery. It has decided that "unpaid residuals in class action litigation [should be] distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians," including distribution to child advocacy programs or to the California Legal Corps. (Code Civ.Proc., § 384, subd. (a).) Rarely will it further the purposes of the underlying action or promote justice to permit a wrongdoing defendant in a class action to simply retain for its own benefit the unpaid residual of the class recovery, and nothing in Code of Civil Procedure section 384 contemplates such a result.

Accordingly, the trial court abused its discretion when it permitted the landlord to retain the unclaimed residual of the class recovery for the landlord's own

benefit. The trial court in this case made no findings and gave no reasons to support its conclusion that the landlord should be permitted to retain the unpaid residual or that would explain why it was fair and just for the landlord to do so. Instead, the trial court simply made the conclusory assertion that "[w]e do not find that the Fluid Recovery method is necessary to fulfill the purpose of this case." Given that it ordinarily does not further the purposes of the underlying action or promote justice to permit a defendant to retain the unpaid residual in a class action, the trial court's unexplained decision to the contrary was an abuse of discretion. This is especially so because the landlord here had previously attempted to evade section 1950.5's predecessor statute and to unlawfully retain security due its tenants by denominating the security a "nonrefundable cleaning fee." (*See Bauman v. Islay Investments* (1973) 30 Cal.App.3d 752, 106 Cal.Rptr. 889.)

CONCLUSION

The Legislature enacted section 1950.5 to protect tenants, not landlords. Section 1950.5(f) sets a clear limit on the landlord's right to set off claims against the security by requiring a landlord to assert any claims against the security within two weeks of the end of the tenancy and then refund the balance. This furthers section 1950.5's purpose of ensuring that landlords routinely refund security due their tenants without the necessity of legal action by their tenants.

Repeatedly invoking its notion of equity, however, the majority ignores the language and purpose of section

1950.5(f) to hold that landlords do not lose their right of setoff after the expiration of the statutory period. I cannot agree with this attempt to rewrite section 1950.5(f) and eviscerate its purpose.

Moreover, the Legislature intended that those tenants who are forced to bring a lawsuit to recover their security have a simple, swift, and certain legal remedy: Section 1950.5 expressly authorizes actions brought under that section to be maintained in small claims court, limits the types of claims that can be asserted against the security, and puts on the landlord the burden of proof as to the reasonableness of any amount claimed against the security. (§ 1950.5, subds. (e), (k), (m).) In turn, section 1950.5(f), by cutting off the landlord's right of setoff after the two-week statutory period, assures the tenant weighing whether to bring an action to recover security that he or she will not be met by a surprise claim of setoff never before raised by the landlord.

The majority's holding upsets this statutory scheme, for a tenant who brings an action to recover security now may be faced with unanticipated claims of setoff the landlord has never before asserted. The tenant's action is made not only unpredictable but more complicated. Undoubtedly, in light of the majority's creation of a landlord's right to setoff in actions to recover security, many tenants will now conclude that it is not worth the effort to bring such an action, just as they did before section 1950.5 – hardly the result the Legislature intended in enacting this consumer protection statute.

For the foregoing reasons, I would reverse the portion of the judgment of the Court of Appeal holding that

the landlord may set off its claims against the illegally withheld security and the portion of the judgment holding that the trial court did not abuse its discretion in limiting the landlord's liability to only the security due those class members who hereafter submit a claim.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LISA GRANBERRY et al.,

Plaintiffs and Appellants,

v.

ISLAY INVESTMENTS et al.,

Defendants and Respondents.

2d Civil No. B113750
(Super. Ct. No. 136428)
(Santa Barbara County)

(Filed April 19, 1999)

JOSEPH A. LANE, Clerk Deputy

A landlord charged more "rent" for the first 31 days of occupancy than for succeeding months to entice tenants to remain. The landlord did not refund security at the end of tenancies, A class of tenants sued the landlord arguing that the higher rent charged constituted a disguised refundable security deposit. The issue was one of fact. The landlord asserted an affirmative defense of setoffs for unpaid rent, repairs and cleaning. A jury concluded that the higher rent was security, but that the landlord acted in good faith in creating its rent reduction program.

Plaintiffs requested that judgment be entered on behalf of the entire class for the aggregate amount of security deposits retained, and that any amounts not claimed by individual tenants escheat to the state. The trial court rejected the request, entered judgment only for those class members who would file individual claims

and deemed fluid recovery as the appropriate remedy. The landlord was not permitted to claim offsets to such individual claims.

After further appeals, our Supreme Court concluded that recovery for the security deposits was not limited to individuals filing claims and that the landlord could seek setoffs as damages against security for amounts of unpaid rent, repairs and cleaning it proved by a preponderance of the evidence, subject to equitable defenses. Fluid recovery was found not to be necessary. It directed the trial court to hold a further evidentiary hearing on the setoff claims and to reconsider its choice of class remedy in light of Code of Civil Procedure sections 382 and 384.[1]

Our Supreme Court deemed premature plaintiffs' assertion that attorneys' fees of 25 percent of the aggregate class recovery are inadequate. The amount of defensive offsets had not yet been determined so the total net class recovery was unknown. It was impossible to state the total number of hours counsel would devote before completing the case. The Supreme Court ordered this court to remand the matter to the trial court for further proceedings consistent with its opinion. (*Granberry v. Islay Investments* (1995) 9 Cal.App4th 738, 752.) We did so.

The trial court heard individual claims, held an evidentiary hearing on setoffs against security to other members of the class, made findings required under section 384 and determined attorneys' fees. The court ruled that the net common fund of $1,025,602, after individual

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[1] All statutory references are to this code unless otherwise stated.

claims, would revert back to the landlord, and that plaintiffs are entitled to attorneys' fees of 25 percent of the common fund.

Lisa Granberry, et al. (Granberry) appeals from the judgment entered which provides that the balance of the fund remaining, roughly $750,000 after payment to plaintiffs of $256,400.50 as attorneys' fees, reverts to respondents, Islay Investments, et al. (Islay). Granberry asserts the trial court's determination of the offset claims is void for lack of jurisdiction and violates due process, substantial evidence does not support the offset claims, the court abused its discretion in denying Granberry's equitable defenses and in determining attorneys' fees. We affirm.

FACTS

Islay charged its tenants more "rent" for the first 31 days of tenancy than for subsequent months. Granberry, a class of Islay's former tenants, sued to obtain refunds of the excess amount Islay denominated as "rent" for the first month's tenancy, alleging that the amount is a disguised, refundable security deposit. In an earlier appeal, we reversed the summary judgment granted defendants and concluded that the character of the excess amount is a triable issue of fact.

Islay amended their answer to allege setoffs for unpaid rent, repairs and cleaning should the jury decide that the excess payments constitute refundable security deposits. The jury found that the excess payments were security deposits, but that Islay had not retained them in bad Faith. The trial court determined that excess payments must be refunded only to members of the class

making individual claims, and that Islay was not entitled to setoffs. The trial court did not require Islay to disgorge the aggregate amount of the security deposits it wrongfully retained and to pay that money into a fund.

In the second appeal, we held that the trial court erred in ruling that defendants were not entitled to setoffs, that the court did not abuse its discretion in granting refunds only to those class members who would come forward to claim them, and that the court did not abuse its discretion in limiting attorneys' fees and Costs to 25 percent of the total amount paid to the class.

Our Supreme Court concluded, inter alia, that Islay may set off damages for unpaid rent, repairs and cleaning it proves by a preponderance of the evidence in a subsequent judicial proceeding against the security deposits Islay retained in good faith, even though Islay initially failed to comply with the summary deduct-and-retain provisions of Civil Code section 1950.5, subdivision (f). The high court ordered the trial court to consider the viability of plaintiffs' equitable defenses. (*Granberry Islay Investments, supra,* 9 Cal.4th at pp. 743-750.)

On remand, the trial court ordered that notice be published in newspapers and that notice and claims forms be mailed to class members before holding the evidentiary hearing. The named plaintiffs failed to file claims or to appear. The court heard and resolved individual claims and offsets for the 111 claimants who responded. Those claims resulted in payments with interest of $9,490.87.

The court conducted an evidentiary hearing as to the remaining members of the class. The uncontroverted evidence established that Islay collected security of $1,418,559 as "rent differential" and "security deposits" during the period at issue. Of the $442,000 in "security deposits," Islay had previously returned $347,000, leaving a net excess revenue of $1,072,000. The court found that Islay proved by a preponderance of the evidence that it suffered setoff damages in reasonable amounts for unpaid rent, repairs and cleaning and that Granberry did not prove any equitable defenses they claimed. After adjustment for ordinary wear and tear, Islay provided evidence that it actually suffered $1,411,000 in damages by the tenant class in excess of the total amount of security collected.

The trial court held a hearing to make findings required by section 364 and to determine attorneys' fees and costs. The court found that the total amount payable to all class members is $1,025,602, less $9,491 in actual, paid claims made, leaving a residue of $1,016,111.

Granberry presented no evidentiary support for attorneys' fees, much less an itemized accounting. Under the common fund doctrine, the trial court found that a fair and reasonable attorneys' fee is 25 percent of the theoretical fund of $1,025,602 which had been calculated pursuant to section 384. The court found that an award of private attorney general fees pursuant to section 1021.5 was inappropriate.

Granberry conceded that the trial court had the power to dispose of the residue. The court found that the individual claims had been paid and it ordered that the

balance of the theoretical fund calculated pursuant to section 384 remain with Islay because it acted in good faith. The court expressly rejected Granberry's claim that the fund should escheat to the state, a remedy that would unjustifiably punish defendants. The named plaintiffs failed to make a claim or appear at any of the proceedings. Accordingly, except for the attorneys' fees of $256,400.50, they did not recover anything,

This appeal ensued from the class action judgment of the trial court entered after hearings were held pursuant to remand.

DISCUSSION

Personal Jurisdiction

Granberry contends that the mailed and published notice did not confer personal jurisdiction required over the certified class. We disagree. (See generally *Phillips Petroleum Co. v. Shutts,* (1985) 4 72 U.S. 797, 811-812 [86 L.Ed.2d 628, 641-642].) The instant, second notice, like plaintiffs' original notice of 1988, advises claimants of their right to refund of security less offsets for unpaid rent and/or costs reasonably necessary to clean and repair damage in excess of ordinary wear and tear pursuant to a scheduled evidentiary hearing.

Granberry has repeatedly raised the issue of lack of notice of Islay's offset claims. (*Granberry v. Islay Investments, supra,* 9 Cal.4th at p. 749.) In its motion to quash service of Islay's cross-complaints, and at other times, Granberry has acknowledged that the trial court has jurisdiction to resolve the affirmative defense of offsets pursuant to class notice provided. In its petition for

rehearing from the last appeal, Granberry again raised these notice and due process arguments. It specifically requested us to consider and determine whether Islay violated notice requirements as to the equitable setoffs. We modified our opinion, rejecting the challenge.

Granberry raised the jurisdictional issue in its petition for review to our Supreme Court. Our high court quoted the pertinent part of plaintiffs' original class notice and also held that "in light of this notice, plaintiffs' contentions regarding . . . lack of notice are unavailing." (*Granberry v. Islay Investments, supra,* 9 Cal.4th at p. 749.) Then Granberry reiterated its challenge in a petition for rehearing to the Supreme Court. The high court denied the petition. The decision of our Supreme Court on this issue is law of the case. (*People v. Stanley,* (1995) 10 Cal.4th764, 766-787; see also *In re Rebekah R.* (1994) 27 Cal.App.4th 1638, 1649 [on the binding nature of counsel's prior positions].)

The offsets are in the nature of an affirmative defense to plaintiffs' certified class action and do not constitute a defective default judgment. (*Granberry v. Islay Investments, supra,* 9 Cal.4th at pp. 743-744; and see generally *Safine v. Sinnott* (1993) 15 Cal.App.4th 614, 618-619.) Accordingly, section 580 does not apply here. The section 384 remedy, discussed infra, is comprised of the sum of security deposits to the class less defensive offsets. Islay's substantive right to the affirmative defense of offsets is not forfeited by the procedural difficulties created by plaintiffs' class action. (*Granberry, supra,* at p. 749; and see generally *In re Gypsum Antitrust Cases* (9th Cir. 1977) 565 F.2d 1123, 1127.)

Our Supreme Court directed the trial court to hold the evidentiary hearing. (*Granberry v. Islay Investments, supra,* 9 Cal. 4th at pp. 749-750.) By using updated mailing lists and published notice in the major newspapers in San Luis Obispo, Santa Barbara and Ventura counties, class members were apprised of the scheduled hearing, their rights to make individual claims for the security deposits and their right to appear at the scheduled hearing for the class. These notices stated that Islay sought offsets against security claims. Indeed, plaintiffs have the responsibility to keep absent class members apprised of their rights and responsibilities as needed throughout the litigation. (See generally *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 871.)

Substantial Evidence Supporting Offsets

Granberry asserts there is no substantial evidence to support the individual offset claims, and that the offsets awarded improperly included all expenses for refurbishing units without allowing for repairs and cleaning attributable to ordinary wear and tear. Granberry challenges whether Islay met its burden of proof to show that the expenses were caused by the tenant or his guests. We presume the judgment is correct and all intendments and presumptions are indulged in favor of it. We must uphold the judgment if it is supported by any substantial evidence. (*Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1254-1255.)

Islay provided evidence on a class-wide basis establishing reasonable damages on the affirmative defense of offsets. (*Granberry v. Islay Investments, supra,* 9 Cal.4th at

pp. 749-750.) Granberry did not rebut it. Donna Ogilvie, the operations officer for Islay, testified that between 1978 and 1983 each unit was inspected by managers when relinquished and was cleaned, repaired and renovated to like-new condition before the next possession. Until 1983, the move-out form Islay used noted only major damage. In January 1983, when Islay denominated an amount paid as the security deposit, it created an inventory and condition report that managers and tenants completed together at move-in and move-out to replace the previous move-out form. Upon possession, each new tenant agreed that the unit was clean and in good repair and that he or she would notify management within 48 hours of possession if the unit did not meet these criteria.

At the 1990 trial, years of business records, including work orders, bills, invoices, pay toll records and move-out forms, compiled and denominated as exhibits 278-280, were introduced to establish an accounting, without objection. At the instant evidentiary hearing, these records were placed in evidence again over Granberry's hearsay objection. The trial court did not abuse its discretion in permitting this evidence. (*Exclusive Florists, Inc. v. Kahn* (1971) 17 Cal.App. 3d 711, 716.) Foundational testimony from Ogilvie established that these exhibits were compiled as computerized secondary evidence of the voluminous written records made at or about the time of the events stated in the regular and ordinary course of Islay's business by sources and means establishing that they are trustworthy. (Evid. Code, §§ 1272, 1521, subd. (a), 1523, subd. (d), 1552, subd. (a); *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 797-798; *People v. Lugashi* (1988) 205 Cal.App.3d 632, 640; *Vanguard*

Recording Society, Inc. v. Fantasy Records, Inc. (1972) 24 Cal.App.3d 410, 418-419.)

Winston Elton, an expert on commercial real estate forensics, examined, analyzed and compared exhibits 278 through 280 with typical security deposit charges, offsets and refunds for similar properties. He determined that Islay's claimed 1980 tenant turnover costs of $225 to $300 per unit were lower than the $350 industry average. Elton verified the accuracy of the files stated in the exhibits and discovered that various actual costs were not included. For example, the cost of paint and painting supplies did not appear. He revised Islay's claimed costs to reflect actual costs and adjusted the figures to include ordinary wear and tear.

Elton testified that the costs set forth in exhibits 278-280 were reasonable and, in fact, did not reflect all costs. In Elton's opinion, Islay suffered a net loss of about $1.4 million, including ordinary wear and tear. Nonetheless, Islay acceded to Granberry's calculation of a higher net revenue figure. Granberry may not challenge the trial court's adoption of plaintiffs' own figure. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1686.) The findings reflect substantial evidence of damages caused by the class tenants supporting the defensive offsets provided in the judgment.

Class Remedy

After the hearing, Granberry conceded that the trial court had discretion to provide a claims-made order with reversion of the residual, unclaimed fund to Islay rather than escheat to the state, pursuant to the directives of our

Supreme Court. Under section 384, the trial court is to direct the defendant to pay the sum of the unpaid residue with interest "in any manner the court determines is consistent with the objectives and purposes of the underlying cause of action. . . . " The trial court has broad discretion in equity to fashion a remedy in class actions. (§§ 384, 382; *Granberry v. Islay Investments, supra,* 9 Cal.4th at p. 751; and see generally *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462; *Green v. Obledo* (1981) 29 Cal.3d 126; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695.)

Under the unclaimed property law, escheat is not the sole remedy. Rather, the court "may exercise the full range of its inherent powers in order to accomplish complete justice between the parties." (*People ex rel. Smith v. Parkmerced Co.* (1988) 198 Cal.App.3d 683, 692-693; § 1519.5.) Because the jury had previously found that Islay acted in good faith, the court found that escheat would not be the most equitable remedy. Escheat would only result in punishing Islay, an unwarranted result. After the evidentiary hearing showing Islay's offsets and other expenses, the court did not abuse its discretion in ruling that the balance of the fund should remain with Islay.

Equitable Defenses

Granberry argues that the trial court erred or abused its discretion in denying the equitable defenses of waiver, estoppel and laches as to Islay's affirmative defense of offsets. Waiver is the voluntary and intentional relinquishment of a known right after knowledge of the facts.

(*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31-32; *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60.) It is a question of fact, and the party claiming waiver must show it by clear and convincing evidence. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 983; *Waller, supra,* at pp. 31-32.)

Plaintiffs assert that Islay waived its right to offsets by use of its rent differential program. Plaintiffs testified at the previous trial that the rent differential program was not misleading. The jury determined that Islay acted in good faith. At the instant evidentiary hearing, plaintiffs failed to appear. As Granberry's counsel conceded, Islay did not intend to waive its right to claim offsets when it made the business decision to adopt the rent differential program. Islay believed that the disputed amounts were rent and treated it as such. Civil Code section 1950.5 was nearly unintelligible; it would be inequitable to charge Islay with notice that its rent discount program constituted taking security deposits.

Estoppel may exist only when a party has falsely, intentionally and deliberately led another to do that which he or she would not otherwise have done, causing injury. (Evid. Code, § 623; *Robinson v. Fair & Housing Com.* (1992) 2 Cal.4th 226, 244-245; *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 16.) This, too, is a question of fact. (*State Compensation Ins. Fund, supra,* at p. 16.)

Granberry argues that Islay's change of position to assert the affirmative defense of offset is subject to estoppel. As noted by the trial court, out Supreme Court has

rejected Granberry's position. (*Granberry v. Islay Investments, supra,* 9 Cal.4th at p. 749.) Our Supreme Court's ruling on the issue is law of the case. (*People v. Stanley, supra,* 10 Cal.4th at pp. 786-788.) There was no knowing representation or concealment by Islay; the jury found that Islay acted in good faith.

Laches requires unreasonable delay in bringing suit, among other things. (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624; *Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359, 361.) Granberry takes the position that Islay is guilty of laches by waiting 15 years before alerting tenants of its offset claims. The trial court properly rejected Granberry's contention. No laches occurred here; Islay asserted its offset claims by amending its answer as soon as it appeared necessary. The "delay" in itemizing offsets from security resulted from Islay's good faith belief that its rent reduction program did not involve security deposits.

Indeed, plaintiffs' initial complaints acknowledged Islay's right to offsets. Both class notices stated that plaintiffs' claim for refund of security was subject to the offsets at issue and Islay has consistently and persistently sought offsets after we concluded that the increased first month's rent constitutes security.

Attorneys' Fees

Granberry challenges the 25 percent limitation on attorneys' fees set by the trial court. (*Granberry v. Islay Investments, supra,* 9 Cal.4th at pp. 751-752.) An " 'experienced trial judge is the best judge of the value of professional services rendered in his court. . . . " ' (*Id.,* at p. 752,

quoting from *Serrano v. Priest* (1977) 20 Cal.3d 2.5, 30.). We may not disturb the ruling of the trial court on this issue unless we are "convinced that it is clearly wrong. (*Serrano v. Priest, supra,* 20 Cal.3d at p. 49.)

At the noticed hearing on attorneys' fees, after determining the offsets, Granberry argued for fees from the common fund and from Islay for private attorney general fees. Granberry asserts that because the trial court took no evidence an the time expended by counsel and the value of its work and did not hold a hearing on private attorney general fees, the trial court abused its discretion in awarding 25 percent of the theoretical fund of $1,025,602 for attorneys' fees. We disagree.

Granberry had more than two months, with one continuance, to prepare an itemized claim for attorneys' fees after the court noticed the January 23, 1997 hearing. Before the hearing, Granberry's counsel filed only a general declaration of spending more than 5,200 hours ($1,250,000) on the case. At the January hearing, Granberry's counsel stated that total attorney time had not yet been fully calculated and asked the court again to delay hearing the matter. Granberry had filed no motion for further continuance, and the trial court saw no reason to delay ruling. The trial court noted that the amount of the fund was established at the time and "we have all the information we need to determine whether or not Section 1021.5 . . . and/or the Common Fund Theory apply." Granberry did not file an itemized claim for. fees until April 7, 1997.

Whether or not to award private attorney general fees is within the broad discretion of the trial court.

(*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659.) To obtain such fees, one must establish that the action resulted in the enforcement of an important right affecting the public interest, conferring a significant benefit on the general public or on a large class of people under circumstances where the necessity and burden of private enforcement transcends the litigants' personal interest. (*City of Hawaiian Gardens v. City of Long Beach* (1998) 61 Cal.App.4th 1100, 1112.) The trial court has the discretion to decide whether attorney fees should be paid out of the recovery. (*Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1422.) The trial court should assess the outcome of the litigation from a practical perspective to determine whether private attorney general fees are warranted. (*City of Hawaiian Gardens, supra,* at pp. 1112-1113; also see generally *Baggett v. Gates* (1982) 32 Cal.3d 128, 142; *Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1767; *Mandicino v. Maggard* (1989) 210 Cal.App.3d 1413, 1416.)

Although the court acknowledged that a case could be made that the action resulted in the enforcement of an important right affecting the public interest, it did not believe an award should be made pursuant to section 1021.5, because there is a common fund available from which fees can be paid. (See generally *Jutkowitz v. Bourns, Inc.* (1981) 118 Cal.App.3d 102, 109-114; *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-91; *Rider v. County of San Diego, supra,* 11 Cal.App.4th at pp. 1422-1423 [private attorney general fees inappropriate where common fund exists].) Moreover, Granberry did not make specific, persuasive arguments supporting the claim for private attorney general fees. Realistically, Granberry achieved only clarification of the definition of "security" under Civil

Code section 1950.5 in the fairly unique situation where a landlord sought in good faith to use a rent reduction program in lieu of security. Section 1950.5 contains no provision for attorney fees. The court did not abuse its broad discretion in denying private attorney general fees. (*Planned Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 692; *Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 79-81.)

The trial court believed that Granberry is entitled to a reasonable fee payable out of the common fund, even though Granberry failed to submit a timely, itemized accounting of hours spent on the case. The trial court was intimately familiar with the case, the parties and counsel's efforts, having been immersed in the matter for 15 years. The trial court needed no further input. It listed and considered all the *Wollersheim factors*, reviewed the complexity of the litigation, the strategic and tactical decisions made by counsel, counsel's success, the amount of unnecessary adversarial skirmishing and whether or not counsel pursued settlement. (*Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th 628.) Granberry exercised its right to try the case rather than accept substantial settlement offers which could have ended the matter many years ago. That the fruits of trial were less than hoped for does not increase their attorneys' fees.

The creation of an actual fund is not required for application of the common fund fee doctrine, and the exact percentage of a theoretical fund is within the broad discretion of the trial court. (*Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026; *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328; *Molendres v. City of Los Angeles* (1975) 45 Cal.App.3d

267.) The 25 percent figure awarded here is the benchmark. It should not be exceeded except in unusual cases. (*Paul, Johnson, Alston & Hunt v. Graulty* (9th Cir. 1989) 886 F.2d 268, 272-273.) Under all the circumstances of the case, the trial court concluded that the noticed contingency fee of 25 percent of the theoretical fund, calculated pursuant to section 384, subdivision (b), is appropriate and that the lodestar approach is inappropriate. (See generally *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 945; *Glendale*, supra, at p. 341, fn. 19; *Rider v. County of San Diego, supra*, 11 Cal.App.4th 1410; *Knoff v. San Francisco* (1969) 1 Cal.App.3d 184, 203; *Melendres*, supra, at pp. 282-284.) The trial court did not abuse its discretion by-awarding 25 percent of the theoretical fund of $1,025,602 for attorneys' fees.

The judgment is affirmed. Costs are awarded to respondents.

NOT TO BE PUBLISHED.

BURKE, J.*
We concur:
GILBERT, Acting P.J.
YEGAN, J.

*Assigned by the Chairperson of the Judicial Council.

NOT TO BE PUBLISHED
[NO CHANGE IN JUDGMENT]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LISA GRANBERRY et al.,

Plaintiffs and Appellants,

v.

ISLAY INVESTMENTS et al.,

Defendants and Respondents.

2d Civil. No. B113750
(Super. Ct. No. 136428)
(Santa Barbara County)
ORDER MODIFYING
OPINION AND
DENYING REHEARING

(Filed *May 18, 1999*)
JOSEPH A. LANE, Clerk
Deputy

It is ordered that the opinion filed herein on April 19, 1999, be modified in the following particulars:

1. On page 1, lines 6 and 7 of the second paragraph, the words "as the appropriate remedy" are replaced with the word "inappropriate" so the sentence reads:

> The trial court rejected the request, entered judgment only for those class members who would file individual claims and deemed fluid recovery inappropriate.

2. On page 2, the third full paragraph is deleted and the following paragraph is inserted in its place: The trial court held an evidentiary hearing on setoffs against security to members of the class, made findings required under section 384 and determined attorneys' fees. Pursuant to class notice, the trial court appointed a referee to

hear individual claims. Only one individual requested a hearing which was mediated and settled. The court ruled that the net common fund of $1,025,602 would revert back to the landlord, and that plaintiffs are entitled to attorneys' fees of 25 percent of the common fund.

Appellants' petition for rehearing is denied. There is no change in judgment.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

LISA GRANBERRY, et al., Plaintiffs, vs. ISLAY INVESTMENTS, et al., Defendants.	CASE NO. 136428 STATEMENT OF DECISION (Filed Jan. 24, 1997)

The above-entitled cause came on regularly for evidentiary hearing pursuant to order of the Supreme Court on October 16, 1996, in Department One of the above-entitled court, the Honorable Ronald C. Stevens, Judge, presiding, without a jury, and was heard on that date and on October 17, 21 and 22, 1996. David H. Schwartz

appeared as counsel for plaintiffs, and Marcus E. Crahan, Jr., Diane M. Matsinger, Antonio R. Romasanta and Betty L. Jeppesen appeared as counsel for defendants. Ernest L. Graves was also present at counsel table for plaintiffs.

Oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The Court, having considered the evidence and heard the arguments of counsel and being fully advised, issues the following statement of decision with respect to the principal controverted issues at the hearing:

Nature Of The Hearing

The California Supreme Court remanded this case to this Court for an evidentiary hearing to consider two issues:

(1) Whether defendants can prove by a preponderance of the evidence (a) that they suffered damages for unpaid rent, repairs and cleaning; and (b) that the amount claimed is reasonable; and

(2) Whether plaintiffs can establish any equitable defenses to those claims.

Granberry v. Islay Investments (1995) 9 Cal.4th 738 (*"Granberry"*) at pages 749-750.

In the California Supreme Court, plaintiffs claimed that defendants' offset claims must be litigated individually. The Supreme Court expressly rejected that claim, and directed this Court to shape a remedy to avoid the practical problems posed by the resolution of defendants'

offset claims within the context of this class action. *Granberry* at page 749.

Following the Supreme Court's direction, this Court shaped a two-part remedy, i.e., to resolve individual offset claims in an administrative procedure and to resolve class-wide claims of damages and equitable defenses in this hearing. Accordingly, and by virtue of prior orders of this Court and the agreement of the parties, this hearing has been held to determine defendants' damage claims and plaintiffs' equitable defense claims on a class-wide basis.

The administrative procedure established by this Court pursuant to Order filed March 27, 1996, has been completed. Some 109 claims were filed. Of those claims, 27 were outside of the definition of the class, and one was prosecuted through an appeal to Judge Arnold Gowans. (See Exhibit 297.) All proper claims have now been resolved and are ready to be paid.

While individual claims were not litigated, and were not required to be litigated, in this hearing, by virtue of the evidence offered by defendants and received by the Court, defendants' offset claims as against each of the individual class members have been established *prima facie*.

Defendants' Damages

The period for calculation of defendants' damages in this case began in April, 1978 (three years before the filing of plaintiffs' original complaint), and ended in June,

1990, when the jury decided that the amount of the differential between the first and second months' rent was a security, but that defendants had acted in good faith in claiming and contending that that amount was rent.

Defendants established that during the damage period there were 9,240 move-outs or turnovers of tenancies, and that, as a result thereof, defendants suffered approximately $1,411,000 in damages (after adjustment for ordinary wear and tear) in excess of the total amount of jury-found and actual security which defendants had taken during that period of time. See Exhibit 291.

More particularly, defendants established that they received approximately $977,000 in jury-found security, and approximately $442,000 in actual security due to a security deposit program instituted in January, 1983, but refunded approximately $347,000 of that security, leaving a total of jury-found and actual security of approximately $1,072,000. See Exhibit 291. Defendants also established that they incurred damages as a result of the 9,240 tenant turnovers in the amount of approximately $3,125,000 which, when reduced by approximately $642,000 in estimated ordinary wear and tear, resulted in net damages of approximately $2,483,000. Subtracting that amount from the total security received results in the net adjusted loss of $1,411,000. See Exhibits 287, 290 and 291.

Defendants also established, in Exhibits 278, 279 and 280, that they had offset claims against the class as a whole in the amount of approximately $1,800,000 (before adjustment for ordinary wear and tear), and against each of the class members as stated therein.

Winston Elton, defendants' expert, testified at length on direct and cross examination as to the nature, necessity, amount and reasonableness of defendants' damages. Indeed, he prepared and explained in detail Exhibit 287, a 378 page summary, based upon Islay's original business records, of the damages Islay suffered on account of each and every one of the 9,240 tenant turnovers which occurred during the damage period.

Thus, as he explained, Exhibit 287 contained, with respect to each of the 9,240 tenant turnovers, the following specific information, where applicable:

The tenant's name, Islay's contract number, apartment complex name and unit number, the dates of the tenant's move-in and move-out, the amounts of the first and second months' rent, the last rent paid, the date the rent was paid to, the date the tenant gave notice of the termination, and the rent due.

Exhibit 287 also contained specific information with respect to whether any lock change or court judgment was involved in any tenant turnover, and the following information with respect to Islay's damages resulting from that tenancy:

The amount of the cost to clean the apartment, the number of hours needed and the amount of the cost to paint the apartment, the amount of the cost to replace carpets and drapes, where applicable, and a summary of all other costs (such as damage to furniture) Islay incurred.

The foregoing damages and costs were based essentially on Exhibits 278-280.

Mr. Elton then adjusted those costs in Exhibit 287 to add certain direct costs (i.e., paint) which were not included in Exhibits 278-280, certain indirect costs (i.e., costs for administration and supervision), and also made an adjustment (reduction) for ordinary wear and tear with respect to costs incurred to paint the apartment or replace carpet, or replace drapes.

Accordingly, defendants have established for the class as whole, and for each class member, that defendants have suffered damages and are entitled to assert offsets for unpaid rent, cleaning, and repair (in excess of ordinary wear and tear) against the class as a whole and each class member who moved out of one of defendants' apartment units during the period April, 1978, to June 1990, as stated in Exhibit 287.

There was no contrary evidence; and plaintiffs' attempt to discredit Mr. Elton or to show the unreliability of Exhibit 287 did not persuade the Court.

Defendants further established through Mr. Elton that the cleaning and repair costs, as well as the unpaid rent losses they suffered, were well within industry standards (see also Exhibits 285 and 286); and that the amounts of their damages and offset claims based thereon were and are reasonable. There was no contrary evidence.

Plaintiffs' request for statements of decision with respect to a more detailed basis for the Court's findings in this respect are denied as calling for statements of evidentiary facts where only statements of ultimate facts are required. *People v. Casa Blanca Convalescent Homes*

(1984) 159 Cal.App.3d 509, 524-527; and *Wolfe v. Lipsy* (1985) 163 Cal.App.3d 633, 643-644.

Defendants also established that the damages they suffered as result of the 9,240 tenant turnovers which occurred during the damage period were proximately caused by the tenant-class members, and so their repair was necessary. Plaintiffs offered no evidence to the contrary.

Paragraph 1 of Islay's rental contract (Exhibits 279c, 292 and 306) provided:

"It is agreed that the tenant is taking possession of a clean unit in good repair (i.e. tenantable per CC 1941.1) and agrees to maintain it in good and clean condition (i.e. tenantable per CC 1941.2). Notify the manager in writing, within 48 hours of occupancy, if the unit is not clean, not in good repair, or untenantable. Your written notice assures corrective action by the owner and precludes additional charges for damages. CC 1941.1 & CC 1941.2 are printed on the back of this page."

Additionally, through the lengthy and detailed testimony of Donna Ogilvie, Director of Islay's Apartment House Operations, defendants established that Islay had a long-established practice of returning its apartment unites to as like-new condition as possible after each move-out, and that Islay made records contemporaneously with each tenancy turnover, which it kept and maintains to this day, reflecting, among other things, the amount of any unpaid rent owed, and the amount of any cleaning, painting, carpet replacement, drape replacement, or other costs, expenses or damage Islay incurred as a result of each tenancy turnover.

Under Evidence Code section 1105, that evidence of Islay's long-established custom and practice is admissible to prove its conduct with respect to each tenancy turnover, and made out at least a *prima facie* case that the tenant moving out was responsible for the unpaid rent, cleaning and damages sought to be charged against him. *Romeo v. Jumbo Market* (1967) 247 Cal.App.2d 817, 823-824.

Donna Ogilvie testified at length, on both direct and cross examination, that all of Islay's business records supporting Islay's offset claims were made contemporaneously with each tenant move-out. For example, she testified that the tenant move-out forms were filled out on move-out date and reviewed by management within days of the move-out; any unpaid rent was calculated at the time of the move-out, or within days thereafter; that whatever cleaning was done or damage repairs made were ordered by the Islay apartment managers at the time of the move-out; and that the work was done by Islay employees or independent contractors, and was paid for, within a matter of only a few weeks thereafter. Plaintiffs offered no contrary evidence.

No Equitable Defenses

Plaintiffs' Proof

The named plaintiffs failed to appear or testify at the hearing. Moreover, the named plaintiffs failed to file claims in the Administrative Claims Procedure. The evidence establishes that the claims of the named plaintiffs are exceeded by defendants' damages and offset claims against them.

More particularly, there is a stipulated judgment filed November 17, 1982, in defendants' favor against plaintiff Granberry for $136.00, which is an amount in excess of her security claims of $100.00. As shown in Exhibit 278 (1980 move-outs, last two pages of Joyce, thirteenth tenancy on sheet), defendants suffered damages in the amount of $249.99 as a result of plaintiff Jordan's tenancy, which is an amount in excess of her security claims of $100.00. As shown in Exhibit 279 (1982 move-outs, third and fourth pages of Michelle, second tenancy on sheet), defendants suffered damages in the amount of $243.00 as a result of plaintiffs Glasspool's tenancy, an amount which exceeds their security claims of $100.00.

Accordingly, the named plaintiffs shall recover nothing from defendants.

However, at the trial of this action in May and June of 1990, the named plaintiffs testified, among other things, that they were not even claiming that the rent differential was a security (Request for Judicial Notice (RJN) pp. 14-15); when they rented from Islay, they considered the rent differential to be rent, not security (RJN pp. 17-18); consequently, they did not have any expectation of getting any money back from Islay when they vacated their apartment units, so did not ask for any money back when they did (RJN p. 18); and, the Islay rental contract (Exhibit 279c) was not misleading, and Islay did not mislead them (RJN pp. 19-21).

The class is bound by that testimony of the named plaintiffs as their class representatives.

Since the named plaintiffs failed to appear or testify at the hearing, they failed to establish any equitable

defenses for the class as a whole. Nevertheless the attorney for the class argued that defendants' offset claims were barred by various equitable defenses, and offered the testimony of five former Islay tenant-claimants in support of his claims.

Plaintiffs' Claims

Waiver:

Waiver is the intentional relinquishment of a known right after full knowledge of the facts. *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60.

The burden is on the party claiming a waiver to prove it by clear and convincing evidence that does not leave the matter to speculation. Doubtful cases will be decided against a waiver. *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-108.

Plaintiffs failed to offer any convincing evidence that defendants intended to waive their offset rights. When these tenants vacated their apartments, defendants did not believe they held any security for which they were required to account, and the jury found that defendants' belief was in good faith. Therefore, defendants cannot be held to have waived any right to offset. In fact, during the course of closing argument, plaintiffs' counsel conceded that at the time defendants made the business decisions which plaintiffs now claim constitute a waiver of their offset rights, defendants did not intend by those business decisions to waive such rights.

Laches:

Laches is the unexcused failure to timely assert a claim or defense in a lawsuit where the untimeliness of the assertion of the claim or defense materially prejudices the opponent. *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.

Plaintiffs' laches claims are without merit. There is no laches here as a matter of law because defendants asserted their offset claims when it first appeared necessary for them to do so. For the first six years of this lawsuit (from 1981 to 1987), plaintiffs conceded defendants right to assert offsets to their security claims in each of their first three complaints (RJN pp. 7-11). In 1987, when plaintiffs sought to be relieved of that admission, defendants promptly asserted their offset rights by a motion to amend their answer and to file a cross-complaint. Additionally, the class as a whole was given mailed and published notice of defendants' offset claims in 1987, as soon as plaintiffs asked the Court to give notice to the class.

The argument of plaintiffs' counsel that the class members are prejudiced by the delay involved in the prosecution of this litigation because the class members allegedly would not be able to defend themselves against Islay's offset claims because they would have no documents or memories of their Islay tenancies was refuted by the testimony of the named plaintiffs in 1990, and by the testimony of the tenant-claimant witnesses called by plaintiffs' attorney to testify at this hearing. Each of the named plaintiffs, and each of the tenant-claimant witnesses, testified in some detail as to the condition of their

Islay apartment units when they left them, the terms of their Islay tenancies, and what happened on both move-in and move-out. Indeed, the tenant-claimant witnesses who testified at the hearing produced original documents relating to their tenancies such as rental contracts and rent receipts. See Exhibits 292 and 306.

The fact that defendants failed to pursue their individual cross-complaints is immaterial. Such failure does not prevent defendants from pursuing their equitable offset claims, as the California Supreme Court has expressly held in rejecting that very argument which plaintiffs made in that court. *Granberry* at page 749.

Estoppel:

For an estoppel to be established, it must be shown that there was a representation or concealment of material facts made with knowledge, actual or virtual, of the facts, to a party ignorant, actually and permissibly, of the truth, with the intention, actual or virtual, that the latter act upon it; and the party must have been induced to act upon it. There can be no estoppel where any one of these elements is missing. Moreover the doctrine acts defensively only. It operates to prevent one from taking unfair advantage of another, but not to give an unfair advantage to one seeking to invoke the doctrine., 11 *Witkin, Summary of California Law,* 9th edition, *Equity,* sec. 177, pages 858-860.

The jury has found that defendants, in good faith, did not believe they held any security for which they were required to account. Thus, there was no knowing representation or concealment upon which a finding of estoppel could be based.

In its discussion in this case, the California Supreme Court dealt with plaintiffs' equitable estoppel claims as follows:

> "Second, plaintiffs contend that to allow defendants to raise setoff would violate the equitable principle that an individual may not change his position to the detriment of another. (See sec. 3512.) They note defendants originally claimed (1) the excess payments were rent, (2) they had never demanded or received security deposits from plaintiffs, and (3) they, not plaintiffs, were to bear the costs of unpaid rent, repairs, and cleaning. Only after the excess payments were found to be security deposits did defendants claim they were entitled to a setoff. Plaintiffs argue this change of position worked to their detriment because they did not receive adequate notice of defendants' claims. However, the original class notice contained the following paragraph: 'Defendants contend that any refund you might be entitled to recover must be reduced by the amount of any unpaid rent, costs reasonably necessary to clean and repair damage you caused to the apartment, in excess of ordinary wear and tear, and that such sum could exceed the amount of any refund or damages you might receive.' In light of this notice, plaintiffs' contentions regarding estoppel and lack of notice are unavailing." *Granberry* at 748-749.

Plaintiffs have offered no evidence of any equitable estoppel other than that already decided against them by the Supreme Court.

Plaintiffs' repeated arguments that the class members were never given notice of defendants' offset claims

simply refuse to acknowledge either the mailed and published notice given in 1987 referred to by the Supreme Court, or the duty of plaintiffs' counsel, as class counsel, to notify his class-member clients of all matters substantially affecting their rights. Indeed, on this latter point, the tenant-claimant witnesses who testified at the hearing stated that when plaintiffs' attorney contacted them, he did not advise them of either their right to request documents supporting defendants' offset claims or of their right to have their claims heard by Judge Gowans on appeal.

Plaintiffs' counsel has consistently refused to represent the unnamed class members on their individual claims and with reference to defendants' offset claims.

Finally, plaintiffs' arguments that defendants should have somehow contacted their tenants during or after their tenancies to advise them of defendants' offset claims runs afoul of the two prior Orders of this Court, the first filed April 27, 1981 (the very date of the filing of plaintiffs' original complaint), which prevented defendants or their agents or employees from engaging in the very communications which plaintiffs now claim they should have engaged in.

Unjust Enrichment:

Unjust Enrichment is a variant of the equitable maxim that "No one can take advantage of his own wrong." C.C. sec. 3517. It is also a variant of the "Clean Hands" doctrine which will be discussed below.

Plaintiffs offered no evidence that defendants were unjustly enriched. Indeed, the evidence is to the contrary.

Defendants were not enriched at all as a result of their rent differential program. They suffered a net loss of approximately $1.4 million in excess of all security taken. There is no evidence to the contrary.

Plaintiffs have argued that defendants retained the class members' security for 15 or more years without paying them any interest on it, and so are thereby unjustly enriched. However, until the verdict in June of 1990, defendants treated the entire amount of the rent differential as rent, paid taxes on it as income, and used it to restore its apartment units to like-new condition on each move-out, as detailed on Exhibits 278-180, and as explained at length by Ms. Ogilvie. Accordingly, there was simply no portion of the rent differential which Islay collected for which it could have earned interest.

Unclean Hands:

The equitable defense of Unclean Hands is based on "unconscientious conduct . . . connected with the controversy." *DeGarmo v. Goldman* (1942) 19 Cal.2d 755, 764.

Plaintiffs failed to offer any evidence of any unclean hands by defendants. There simply is no testimony by any of the named plaintiffs, or by any of the tenant-claimant witnesses who testified at the hearing, to establish the defense of Unclean Hands. As noted, the named plaintiffs, as class representatives, testified at the trial in May and June of 1990 that Islay's rental contract was not misleading, that they had not been misled, that they had no expectation of receiving any money back when they vacated their units, and so did not seek any money back when they vacated (RJN pp. 14-24).

Defendants did not profit from their rent differential program; in fact, defendants lost approximately $1.4 million in excess of all security taken as a result of engaging in that program. None of the tenant-claimants who testified at the hearing testified that Islay had misled them or misrepresented in any way. Indeed, plaintiffs' counsel did not even ask them questions concerning the alleged unclean hands.

Conclusion

We have been persuaded by a preponderance of the evidence that the defendants have suffered damages for unpaid rent, repairs and cleaning and that the amounts of the claims are reasonable. No evidence has been presented which is sufficient to establish any equitable defense to defendants' claims.

Dated: 1/24/97

/s/ Ronald C. Stevens
Ronald C. Stevens
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

LISA GRANBERRY, et al., Plaintiffs, vs. ISLAY INVESTMENTS, ET AL., Defendants.	CASE NO. SB 136428 CLASS ACTION JUDGMENT AFTER REMAND (Filed May 14, 1997)

At all times mentioned herein, plaintiffs were represented by David H. Schwartz, and defendants were represented by Marcus E. Crahan, Jr., Diane M. Matsinger, Betty L. Jeppesen and Antonio R. Romasanta. On May 8, 1995, the court received the Memorandum of Opinion and Remittitur from the Court of Appeal and Supreme Court and commenced proceedings in accordance with those opinions.

Plaintiffs challenged both the form and content of the proposed class notice as well as the power and jurisdiction of this court to adjudicate offsets against absent class members. After hearing on March 15, 1996, the court found:

1. The court had jurisdiction to adjudicate defendants' offset claims.

2. Notice would be mailed by first class mail to those class members whose address was ascertainable. Notice would also be published in one newspaper in each of the Tri-counties three times at weekly intervals.

3. The court specifically found that said notice was the best notice possible under the circumstances.

Such notice was in fact given by mail on March 29, 1996, and by publication on April 2, 9 and 16, 1996, in the Santa Barbara News-Press, the Ventura County Star and the San Luis Obispo County Telegram Tribune.

The court then commenced proceedings pursuant to the direction of the Supreme Court, scheduling an evidentiary hearing to determine (a) whether defendants were entitled to set off damages for unpaid rent, repairs and cleaning and whether those damages were reasonable, and (b) to determine whether defendants' claims were barred by any of the generally applicable equitable defenses. The evidentiary hearing was held on October 16, 17, 21 and 22, 1996. The named plaintiffs did not appear. Plaintiffs' motions for non-suit during the course of the evidentiary hearing were heard and denied.

On January 24, 1997, the court issued its Statement of Decision. The court's findings as set forth in that Statement of Decision are incorporated herein as part of this Judgment. The court found that defendants proved by a preponderance of the evidence that they had suffered damages for unpaid rent, repairs and cleaning and that the amount thereof was reasonable. The court also found that plaintiffs did not prove any of the equitable defenses which they claimed, including laches, waiver, estoppel, unclean hands, and lack of notice.

Between March 27, 1996, and March 10, 1997, according to a procedure established by the court, and with the assistance of a Referee and a Court's Officer, the court processed the claims of 111 absent class members. The named plaintiffs did not file claims.

The court then set a hearing and continued it once at the parties' request, for the following purposes: (a) to make the findings required by Code of Civil Procedure section 384, and (b) to determine attorneys fees and costs. After hearing and argument on January 23, 1997, the court found (a) the total amount payable to all class members if all class members made a timely claim is $1,025,602; (b) the total amount of the claims is $9,491, leaving a "residue" of $1,016,111. Plaintiffs' counsel presented neither an itemized claim for attorneys fees, nor any evidentiary support therefor, Plaintiffs' request to set the matter of fees for further hearing was denied for lack of good cause because 62 days had elapsed between the setting of the hearing and the hearing itself. The court found that an award of attorneys fees under Code of Civil Procedure section 1021.5 was not appropriate under the circumstances presented by the case. The court found that a fair and reasonable fee under the Common Fund Doctrine was 25% of the theoretical fund of $1,225,602 calculated pursuant to Code of Civil Procedure section 334.

The court then set a further hearing to determine the disposition of the "residue." On March 27, 1997, after briefing and argument and the concession by plaintiffs' attorneys that the court had the power to do so, the court found that the claims had been paid, and ordered that the balance of the theoretical fund calculated pursuant to Code of Civil Procedure section 384b should remain with defendants because they acted in good faith. The court rejected plaintiffs' claim that the theoretical fund should escheat to the state because that remedy would only result in punishing defendants and punishment is not warranted.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Having failed to make a claim or 'appear at any of the proceedings concerning their claims, the named plaintiffs, Lisa Granberry, Cosettie Jordan, Alice Glasspool and Christopher Glasspool are not entitled to and shall not recover anything from defendants or either of them, except as provided in paragraph 2 below.

2. Plaintiffs shall have and recover from defendants Islay Investments and Marvin R. Trevillian attorneys fees in the amount of $256,400.50 in accordance with notices previously given to the class.

3. After payment of the claims of the absent class members (which has already been accomplished) and attorneys fees as aforesaid, the balance of the theoretical fund calculated pursuant to Code of Civil Procedure section 334b shall remain with defendants.

4. The claims process having been completed, the Referee and the Court's Officer are hereby discharged, and, when defendants shall have paid to plaintiffs the amount of attorneys fees provided for in paragraph 2 above, defendants shall be discharged from any further liability or obligation to plaintiffs and the class except for properly allowable statutory costs.

Dated: MAY 15, 1997, 1997.

RONALD C. STEVENS
RONALD C. STEVENS, JUDGE

Second Appellate District, Division Six, No. B113750
S079466

IN THE SUPREME COURT OF CALIFORNIA

LISA GRANBERRY Et Al., Appellants

v.

ISLAY INVESTMENTS Et Al., Respondents

(Filed Aug. 11, 1999)

Petition for review DENIED.

GEORGE
Chief Justice

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA BARBARA

LISA GRANBERRY, et al.,	)	
	)	CASE NO.: 136428
Plaintiffs,	)	NOTICE TO THE CLASS
vs.	)	
ISLAY INVESTMENTS, et al.,	)	
	)	
Defendants.	)	

TO ALL PAST TENANTS OF RESIDENTIAL APARTMENTS MANAGED BY ISLAY INVESTMENTS:

IF YOU RENTED an apartment managed by Islay Investments prior to September 1, 1984, **AND IF YOU VACATED** on or after April 27, 1978 and prior to June 13, 1990, **AND**

IF YOU PAID a higher amount of rent for the first month (or 31 days) of your tenancy than for the second and subsequent months, **SO LONG AS YOU PAID** your rent on a monthly basis, **THEN**

YOU ARE HEREBY NOTIFIED that this class action lawsuit, which was filed on your behalf in the Santa Barbara Superior Court and about which prior notice was published and mailed in March of 1988, has been tried and appealed and the result is as follows:

THE JURY FOUND that the difference between the amount of money you paid for the first month (or 31 days) of your tenancy and the amount of money you paid for the second and subsequent months was a "security"

as that term is defined by California Civil Code section 1950.5, and

THE JURY ALSO FOUND that defendants did not act in bad faith with respect to taking and/or retaining of the "security."

THE COURT HAS DIRECTED that the security be refunded to those entitled who make a timely claim. However, as you were advised in the original class notice published on or about March 3, 1988, any refund you might be entitled to recover may be reduced by the amount of any unpaid rent, and/or costs reasonably necessary to clean and repair damage you caused to the apartment, in excess of ordinary wear and tear. Defendants have alleged offsets against the claims of approximately 80% of the class members and have the burden of proof with respect to these offsets.

THE COURT WILL CONDUCT AN EVIDENTIARY HEARING to determine the amount and reasonableness of these offset claims on a class-wide basis and to determine whether any equitable defenses apply. That hearing is scheduled for July 8, 1996, at 9:00 a.m., in Department One of the Santa Barbara Superior Court at 1100 Anocapa Street, Santa Barbara, California, 93101. You are invited to attend. If you wish to be heard, please notify the Court in writing at least 10 days before the hearing.

YOU ARE HEREBY NOTIFIED that if you wish to make a claim for recovery, you must complete a Claim Form, which you **MUST** obtain from and return to:

Louise K. Mizota
136 East Carrillo Street
Santa Barbara, California 93101
(805) 962-9161

IF YOU WISH TO MAKE A CLAIM, YOUR CLAIM MUST BE FILED WITHIN 90 DAYS FROM THE DATE OF THIS NOTICE. You will then receive notice from defendants of the amount of your security and, if applicable, the amount of defendants' claimed offsets for unpaid rents, cleaning and/or repairs. This notice will also advise you of the procedure to follow if you contest any of the offsets claimed by defendants.

THE COURT WILL DETERMINE at a future hearing, the amount of attorneys fees and costs to be paid to plaintiffs' counsel. The Court will also determine at that hearing whether the attorneys fees and costs are to be paid by defendants or by plaintiffs. If the court determines that plaintiffs must pay their own attorneys fees the amount of fees and costs will total thirty three and one third percent (33 and 1/3%) or less of your recovery, which fees and costs will be deducted from your recovery.

IF YOU FAIL TO MAKE A TIMELY CLAIM ACCORDING TO THE INSTRUCTIONS PROVIDED IN THIS NOTICE, YOU WILL HAVE NO FURTHER RIGHT OR CLAIM TO RECOVER FROM ANYONE IN THIS CLASS ACTION.

Plaintiffs are represented by:

David H. Schwartz, and Ernest L. Graves
Law Offices of David H. Schwartz
240 Stockton Street, Suite 300
San Francisco, CA 94108
(415) 362-2700

Anyone may examine the file in this action in the office of the Clerk of the Superior Court, in the Courthouse, at 100 Anacapa Street (Anacapa and Figueroa Street) Santa Barbara, California – **DO NOT CALL THE COURT!**

Dated: March 27, 1996.

RONALD C. STEVENS
JUDGE OF THE SUPERIOR COURT

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§ 1950.5. **Security for rental agreement for dwelling property of tenant; "security" defined; limits on amount; claims against security; statement and accounting; damages; venue; applicability**

(a) The provisions of this section shall apply to security for a rental agreement for residential property, that is, property used as the dwelling of the tenant.

(b) As used in this section, "security" means any payment, fee, deposit or charge, including, but not limited to, an advance payment of rent, used or to be used for any purpose, including, but not limited to, any of the following:

(1) The compensation of a landlord for a tenant's default in the payment of rent.

(2) The repair of damages to the premises caused by the tenant.

(3) The cleaning of the premises upon termination of the tenancy.

(c) A landlord may not demand or receive security, however denominated, in an amount or value in excess of an amount equal to two months' rent, in the case of unfurnished residential property, and an amount equal to three months' rent in the case of furnished residential property, in addition to any rent for the first month paid on or before initial occupancy. This subdivision shall not be construed to prohibit an advance payment of not less than six months' rent where the term of the lease is six months or longer.

This subdivision shall not be construed to preclude a landlord and a tenant from entering into a mutual agreement for the landlord, at the request of the tenant and for a specified fee, or charge, to make structural, decorative, furnishing, or other similar alterations, such alternations being other than that cleaning or repairing for which the landlord may charge the previous tenant as provided by subdivision (e).

(d) Any security shall be held by the landlord for the tenant who is party to such lease or agreement. The claim of a tenant to such security shall be prior to the claim of any creditor of the landlord.

(e) The landlord may claim of the security only such amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, exclusive of ordinary wear and tear, or to clean such premises, if necessary, upon termination of the tenancy. No later than two weeks after the tenant has vacated the premises, the landlord shall furnish the tenant with an itemized written statement of the basis for, and the amount of, any security received and the disposition of such security and shall return any remaining portion of such security to the tenant.

(f) Upon termination of the landlord's interest in the dwelling unit in question, whether by sale, assignment, death, appointment of receiver or otherwise, the landlord or his agent shall, within a reasonable time, do one of the following acts, either of which shall relieve him of further liability with respect to such security held:

(1) Transfer the portion of such security remaining after any lawful deductions made under subdivision (e) to the landlord's successor in interest, and thereafter notify the tenant by personal delivery or certified mail of such transfer, of any claims made against the security, and of the transferee's name, address, and telephone number. If the notice to the tenant is made by personal delivery, the tenant shall acknowledge receipt of such notice and sign his name on the landlord's copy of such notice.

(2) Return the portion of such security remaining after any lawful deductions made under subdivision (e) to the tenant, together with an accounting as provided in subdivision (e).

(g) Upon receipt of any portion of such security under paragraph (1) of subdivision (f), the transferee shall have all of the rights and obligations of a landlord holding such security with respect to such security.

(h) The bad faith claim or retention by a landlord or transferee of a security or any portion thereof, in violation of this section, may subject the landlord or his transferee to damages not to exceed two hundred dollars ($200), in addition to any actual damages. In any action under this section, the landlord shall have the burden of proof as to the reasonableness of the amounts claimed.

(i) No lease or rental agreement shall contain any provision characterizing any security as "nonrefundable."

(j) Any action under this section may be maintained in small claims court if the damages claimed, whether

actual or Punitive or both, are within the jurisdictional amount allowed by Section 116.2 of the Code of Civil Procedure.

(k) To the extent that this section is a recodification of the provisions of Chapter 1317 of the Statutes of 1970, as amended by 618 of the Statutes of 1972, this section became operative on January 1, 1971, and shall apply only to payments or deposits made on or after such date.

The amendments made to the law, as effective on January 1, 1977, by the enactment of this section in the 1977-78 Legislative Session, exclusive of subdivision (e), shall be applicable to all tenancies, leases, or rental agreements for residential property created or renewed on or after January 1, 1978.

Subdivision (e) of this section shall be applicable to all tenancies, leases, or rental agreements for residential property terminated on or after January 1, 1978.

§ 384. Unpaid residuals in class action litigation; amendment of judgment; State Bar obligation; application to state entity or employee

(a) It is the intent of the Legislature in enacting this section to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians. The Legislature finds that the use of funds collected by the State Bar pursuant to this section for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.

(b) Except as provided in subdivision (d), prior to the entry of any judgment in a class action established pursuant to Section 382, the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue, plus interest on that sum at the legal rate of interest from the date of entry of the initial judgment, in any manner the court determines is consistent with the objectives and purposes of the underlying cause of action, including to child advocacy programs and to the California Legal Corps, as established pursuant to Section 6034 of the Business and Professions Code. The court shall ensure that notice is given to the State Bar of California of any such order.

(c) Nothing in this section shall create an obligation or pledge of the credit of the State Bar of California. Neither the State Bar nor its officers and employees shall be liable for damage or injury arising out of any act or omission in the implementation or administration of this section.

(d) This section shall not apply to any class action brought against any public entity, as defined in Section 811.2 of the Government Code, or against any public employee, as defined in Section 811.4 of the Government Code. Provided, however, that this section shall not be construed to abrogate any equitable cy pres remedy which may be available in any class action with regard to all or part of the residue.

Supreme Court, U.S.
FILED
DEC 10 1999
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No. 99-806

In The

Supreme Court of the United States

LISA GRANBERRY, COSETTI JORDAN, ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL, on behalf of themselves and all others similarly situated,

Petitioners,

v.

ISLAY INVESTMENTS, a California Partnership, MARVIN TREVILLIAN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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44pp

ANSWERS TO QUESTIONS PRESENTED

1. In a class action by tenants against their former landlord for the return of a security deposit less offsets for unpaid rent, cleaning and repairs (Cal. Civ. Code sec. 1950.5), the trial court had jurisdiction over the entire cause where:

a. the entire cause (i.e., security less offsets) was certified as a class action and the trial court expressly found, *inter alia,* that the named plaintiffs could adequately represent the class as to all issues;

b. the original class notice advised absent class members that the resolution of "security less offsets" was at issue and that petitioners' counsel would represent them;

c. the California Supreme Court directed that the offsets be allowed under the equitable principle that either party to a transaction involving mutual debts and credits can strike a balance holding himself owing or entitled only to the net difference (Cal. Code of Civ. Proc. sec. 431.70;

d. the trial court utilized the device of split trials – an evidentiary hearing as to class-wide issues and an individualized claims process, with a second class notice advising absent class members of their right to make a claim and a provision for individual hearings in accordance with California Small Claims procedures; and

e. no offsets were adjudicated against any absent class member. The trial court considered offsets against non-claiming class members for the sole purpose

ANSWERS TO QUESTIONS PRESENTED – Continued

of calculating the amount made available for the class to determine attorneys' fees (Cal. Code of Civ. Proc. sec. 384).

2. An order for the reversion of unclaimed class funds to defendants is proper where, as here:

a. the California Legislature has preserved the trial court's equitable discretion with respect to the disposition of unclaimed class funds (Cal. Code of Civ. Proc. sec. 384);

b. the case arises out of respondents' good faith misinterpretation of a California statute which the California appellate court held "teeters on the brink of unintelligibility";

c. under California law, unclaimed security does not belong to the tenant; to the extent that the security exceeds the offsets, the sum is a debt owed by the landlord to the tenant;

d. the amount ordered to revert to respondents was theoretical, because respondents suffered a $1.4 million net loss on the program found to involve a security. That $1.4 million, plus all of the security, was spent for the benefit of the class, to remedy defaults in rent, and to pay for cleaning and repairs;

e. the second class notice specifically advised the absent class members that, if they did not make a claim, their right to a refund would be extinguished.

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THERE ARE NO GROUNDS FOR ISSUANCE OF A WRIT OF CERTIORARI

Petitioners invoke this Court's jurisdiction under 28 USC section 1257(a). They apparently claim a "title, right, privilege or immunity . . . specially set up or claimed under the Constitution." There are no grounds for issuance of a Writ of Certiorari for the following reasons:

A. There is No Party With Standing to Present the Writ. Federal standing "requires an allegation of a present or immediate injury in fact, where the party requesting standing has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.' " *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805, 86 L.Ed.2d 688, 641-642, 105 S.Ct. 2965 (1985). The named plaintiffs have no standing because the offsets against them exceeded the amount of their security. The class claimants are not before the Court; they have all been paid and none has appealed. The only party with arguable standing to challenge the adequacy of his or her representation in this action would be an absent class member who does not wish to be bound by the class action judgment. However, it is well settled that such a challenge is made in a subsequent attack on the judgment, and not in this proceeding. *Zablocki v. Redhail*, 434 U.S. 374, 378, fn. 6, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1244-1245 (9th Cir., 1997).

B. Petitioners Did Not Preserve Their Claims for this Court's Review in Any Event. As the California

Court of Appeal found (Pet. App. 44), petitioners conceded the trial court's jurisdiction to resolve the question of security less offsets on several occasions. Moreover, after remand from the California Supreme Court, petitioners conceded the trial court's discretion to order reversion. Therefore, the issues presented by petitioners were not timely raised and not preserved for this Court's review. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 2820, fn. 4, 65 L.Ed.2d 973 (1980); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308, 23 S.Ct. 375, 47 L.Ed. 480 (1903).

Furthermore, the due process required for jurisdiction over absent class members involves (a) the best practicable notice (which should describe the action and the plaintiffs' rights in it), (b) a provision for absent class members to opt out, and (c) the requisite finding that the named plaintiff adequately represents the interests of the class. *Phillips Petroleum Co. v. Shutts, supra*, 472 U.S. 797, 811-812. The requirements of *Phillips* were met in this case. Certification orders are appealable orders in California (*see, e.g., Block v. Major League Baseball*, 65 Cal.App.4th 538 (1998)); petitioners did not appeal. Therefore, petitioners' challenge to jurisdiction was not timely raised or preserved for this Court's review. *Loeb v. Trustees of Columbia Twp.*, 179 U.S. 472, 481, 45 L.Ed. 280, 21 S.Ct. 174 (1900); *Mutual Life Ins. Co. v. McGrew, supra*, 188 U.S. 291, 308.

Finally, the original class notice, mailed and published per *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 40 L.Ed.2d 732, 746-747, 94 S.Ct. 2140 (1974), advised the absent class members that they would be represented by petitioners' counsel (App. 1, 6). The California Supreme

Court took heed of that notice and found, as a factual matter, that petitioners' contentions regarding "lack of notice [were] unavailing" (*Granberry v. Islay Investments*, 9 Cal.4th 738, 749 (Pet. App. 15) (1995)). Petitioners' counsel represented the absent class members throughout the proceeding and, at the conclusion of the case, took fees for that representation pursuant to the class notice.

For all these reasons, petitioners have not preserved their claims for this Court's review.

C. There is no Federal Question.[1] Throughout this case, the California Courts have construed California statutes in accordance with their California legislative history. This Court has long held that "it is not our function to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S. 524, 94 S.Ct. 740, 744, 38 L.Ed.2d 702 (1974); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 1541, fn. 9, 56 L.Ed.2d 1 (1978).

1. California Civil Code section 1950.5 (Pet. App. 83-86). This statute governs the relationship between landlords and tenants in California with respect to security deposits. In pertinent part, the statute requires

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[1] The California Courts did not decide any of petitioners' alleged federal questions. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S.Ct. 2296, 2300-2301, fn. 3, 76 L.Ed.2d 497 (1983). Petitioners have not made the requisite showing.

a landlord to return the security deposit within a specified time after the termination of a tenancy, and to provide a written accounting of any portion retained as compensation for unpaid rent, repairs and cleaning (Civ. Code sec. 1950.5, subd. (f)). The California Supreme Court granted review in *Granberry v. Islay Investments, supra,* 9 Cal.4th 738 to determine "whether a landlord who in good faith fails to comply with the requirements of [section 1950.5] may nevertheless recover damages for unpaid rent, repairs, and cleaning in a subsequent judicial proceeding" (*Ibid.*, 9 Cal.4th at p. 741 (Pet. App. 2)).

The resolution of the issue turned on an analysis of the legislative history of section 1950.5 (*Ibid.*, 9 Cal.4th at pp. 744-749 (Pet. App. 7-16)). Federal courts defer to state courts' analysis of state legislative history. *Exxon Corp. v. Eagerton, supra,* 103 S.Ct. 2296, 2301, fn. 3. The resolution of the question also turned on the California Supreme Court's conclusion that a defensive setoff is not a separate claim, but is instead founded on the equitable principle that "either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled only to the net difference" (*Ibid.*, 9 Cal.4th at p. 744 (Pet. App. 6)).[2]

Within the statutory matrix of section 1950.5, the Legislature created a debtor-creditor relationship between landlord and tenant with respect to the security. *Korens v. R. W. Zuken,* 212 Cal.App.3d 1054 (1989). Therefore, the resolution of a defensive setoff between landlord

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[2] This Court has recognized similar principles. *See, e.g., Scammon v. Kimball,* 92 U.S. 362, 367, 23 L.Ed. 483, 485 (1875).

and tenant does not constitute a "taking" of the tenant's property.

2. California Code of Civil Procedure section 431.70 (App. 11). The California Supreme Court confirmed that this statute simply provides a *procedure* for the assertion of equitable offsets (*Ibid.*, 9 Cal.4th at p. 744 (Pet. App. 7)). "The Federal Constitution does not undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced . . . " *Honeyman v. Hanan*, 302 U.S. 375, 378, 58 S.Ct. 273, 82 L.Ed. 312 (1937). Moreover, and in any event, the assertion of a private offset, even if granted by the Legislature, does not constitute state action for the purpose of the Fourteenth Amendment to the United States Constitution. *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 357 (1974).[3]

3. California Code of Civil Procedure section 384 (Pet. App. 87-88). This statute provides guidance for the exercise of broad discretion by trial courts with respect to the disposition of unclaimed residue in class actions. *Granberry v. Islay Investments, supra*, 9 Cal.4th at pp. 750-751 (Pet. App. 18). The California Supreme Court rejected petitioners' claim that this statute, in conjunction with the California Unclaimed Property Law (Cal. Code of Civ. Proc. sec. 1500, et seq.), mandated escheat of unclaimed residue in all class actions.

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[3] *See, Bank of Marin v. England*, 385 U.S. 99, 101, 87 S.Ct. 274, 17 L.Ed.2d 197, 200 (1966), noting that the relationship between a debtor and creditor is founded upon contract and therefore not a state action.

The trial court, contrary to petitioners' drum beat throughout their petition, **did not "adjudicate"** any offsets against any absent class members; only those class members who made a claim had their offsets individually adjudicated pursuant to an administrative procedure painstakingly established after several hearings.

THERE WAS NO ERROR IN ANY EVENT

California courts follow federal precedent and procedure in class actions. *Green v. Obledo*, 29 Cal.3d 126, 146 (1981). In this case, the California courts followed the principle set forth by this Court in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980): a class action right is a "procedural right only, ancillary to the litigation of substantive claims." Therefore, when the California Supreme Court held that a good faith landlord did not forfeit offsets for failure to timely comply with the accounting requirements of Civil Code section 1950.5, the California Supreme Court preserved respondents' right to assert those offsets, even though the form of the action was a class action.[4] The following abbreviated explanation of this lengthy litigation conclusively demonstrates that there was no error.

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[4] "Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going." *Granberry, supra*, 9 Cal.4th at p. 749 (Pet. App. 16).

The Nature of the Case, the Class Certification and the Original Class Notice

The rental agreements for this class did not provide for a security deposit. The disputed sums were received as rent under a rent discount program, in which tenants elected to pay their rent daily, weekly, bi-weekly, or monthly. Depending upon the option which the tenant chose, the rent for the second and subsequent months might be more or less than the first month (Exh. 279C (JAII 6412)).[5]

In 1981, petitioners' attorneys solicited the named plaintiffs as class representatives and alleged that, in those cases where the tenant's election resulted in a lesser rent for the second and subsequent months, the differential constituted a "security" within the meaning of California Civil Code section 1950.5 (Pet. App. 83-86). The statute, which the California Court of Appeal found "teeters on the brink of unintelligibility"[6] (*Granberry v. Islay Investments*, 161 Cal.App.3d 382, 388 (1984)), provided fertile ground for the litigation – now in its 19th year.

Petitioners' complaint acknowledged respondents' right to offset under Civil Code section 1950.5. In

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[5] Rent discount programs were not uncommon in California at the time. The California Legislative Counsel commented: "[I]nsofar as a landlord is not prohibited from imposing a de-escalating rent structure, we are of the opinion that a landlord may lawfully charge a greater amount for the first month's rent than for succeeding months" (JAI (AB 3721)).

[6] Section 1950.5 defines "security" as " . . . **any payment**, fee, deposit or charge, including, but not limited to, an advance payment of rent, **used or to be used for any purpose**, including, but not limited to, any of the following [rent, repair of damage, cleaning, etc.]." (Pet. App. 83.)

petitioners' motion for class certification, they stated: "[respondents] will have an obligation to refund such surcharges to each tenant less only those deductions, otherwise proper, which defendants now may take according to Civil Code section 1950.5(e)" (JAI 223). Over respondents' opposition,[7] the case was certified as a class action. The trial court found: (a) the "action involves a question of common or general interest," (b) "common and similar issues of fact and law predominate over issues which must be tried on an individual basis," (c) "[a]ll of the plaintiffs are members of the class and their claims are representative of the claims of the unnamed members of the class," (d) **"[t]he plaintiffs are able to fairly and adequately represent and protect the interests of all class members"** (JAI 1009-1011, emphasis added). **Petitioners have never challenged the certification order.**

In 1982, the trial court granted summary judgment for respondents, finding that the "first month's rental charged by Islay was 'rent' in fact as well as in name" (JAI 1026). However, in 1984, the California Court of Appeal reversed, holding that the question of whether funds constitute "security," as that term is defined by

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[7] Respondents opposed certification (JAI 907). After remand from *Granberry v. Islay Investments, supra*, 161 Cal.App.3d 384, respondents moved to decertify the class because separate hearings would be required for each class member (JAI 1170-1211, 1192-1197). Petitioners opposed, claiming that both security and offsets could be determined on a class-wide basis (JAI 1348-1356). Respondents' motion was denied and the class remained certified.

section 1950.5, involves a question of fact. *Granberry v. Islay Investments, supra,* 161 Cal.App.3d at p. 388.

On remand, the trial court granted respondents leave to amend their answer to allege offsets for unpaid rent, repair, and cleaning in the event a jury were to find that the disputed sum was a security. With the exception of named plaintiff Granberry, against whom judgment was entered on a cross-complaint, **the offsets remained in the case only as an affirmative defense.**

As the Court of Appeal found (Pet., App. 44), petitioners conceded the trial court's jurisdiction over the affirmative defense of offsets throughout the proceedings. In fact, in one of those concessions, petitioners suggested the very procedure which the trial court ultimately adopted to resolve the offsets:

> "Quashing service of the cross-complaints . . . will not divest the Court of jurisdiction to determine the viability of the affirmative defenses alleged in Islay's answer to the Second Amended Complaint. This Court can determine the viability of such setoff claims in the context of the class action, and, should the court find that some of those set-off claims can be asserted and are viable, devise an appropriate method to resolve the individual fact issues relevant to a determination of the amount, if any, owed by Islay to each individual absent class member." JAI 2397-2398.

In accordance with the complaint, the answer, the certification order, and petitioners' concessions, the original class notice (App. 1-10) advised the class that any refund they might be entitled to recover "must be

reduced by the amount of any unpaid rent, costs reasonably necessary to clean and repair damage you caused to the apartment, in excess of ordinary wear and tear." The notice also advised the class that, if they did not request to be excluded, they would be represented by petitioners' counsel (App. 1, 5-6).

The original notice was **published** and **mailed** to each class member for whom petitioners had an address.[8] Petitioners **never** challenged the adequacy of the notice in the California courts.

There is no support, in law or logic, for petitioners' claim that "actual notice" to each member of this class was required. The "elementary and fundamental requirement of due process" is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950). In class actions, publication and mailing to all class members whose addresses can be ascertained is the "best notice practicable." *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. 156, 40 L.Ed.2d 732, 746-747, citing *Mullane*.[9]

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[8] The original notice was mailed to 5,438 class members whose addresses could be ascertained; 3,682 (or 68%) of the first notices were received (JAI 1892-1893).

[9] In *Mullane*, this Court specifically held that published notice was constitutionally sufficient for beneficiaries whose interests or whose whereabouts could not be ascertained. In *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 77 L.Ed.2d 180, 103 S.Ct. 2706 (1983) and *Tulsa Collection Services v. Pope*, 485

The order for certification, and the notice to the class, established the trial court's jurisdiction over absent class members. *Phillips Petroleum Co. v. Shutts, supra,* 472 U.S. 797, 811-812.[10]

In 1988 and 1989, at a cost in excess of $160,000, respondents itemized the damages for each tenancy in the class and provided the information to petitioners' counsel during discovery. The information was not provided to individual class members because respondents were restrained from any and all contact with class members about the subject matter of the litigation (JAII 4795-4797).

Shortly before trial in 1990, the trial court dismissed respondents' affirmative defense of offsets. That is the ruling which the California Supreme Court later reversed (*Granberry v. Islay Investments, supra,* 9 Cal.4th 738 (Pet. App. 1-38)).

When the case was tried in 1990, the jury was provided copies of portions of the statute but was **not** informed that the court had forfeited respondents' offsets

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U.S. 470, 490, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988), this Court held published notice insufficient only because the names and addresses of parties were known or reasonably capable of ascertainment.

[10] This case is readily distinguishable from *Ortiz v. Fibreboard Corp.*, ___ U.S. ___, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), which involved the conditions for certifying a mandatory settlement class on a limited fund theory. In *Ortiz*, the due process rights of the absent class members were implicated because the trial court did not protect the "potentially conflicting interests" of various categories of claimants to the limited fund (*Ibid.*, 119 S.Ct. at p. 2308).

(JAI 3955, 3981-3982, 3989). The class representatives testified: (a) they had no complaints about the rent discount program; (b) they were not misled; (c) they did not expect any accounting or refund when they vacated their apartments because they did not believe they had paid a security. Similarly, respondents testified that they treated the disputed sum as rent for all purposes. All rents were deposited into Islay's general account (subject to income and other taxes), from which respondents paid the costs of operation, including cleaning and damage repair. (JAII 5914.8-5914.9).

After a 23-day jury trial and 4 days of deliberation, the jury found (by vote of 9 to 3) that respondents had taken a "security" within the meaning of section 1950.5. The finding confirmed the problem with Civil Code section 1950.5 – a transaction can involve a "security" even though a landlord thinks he took only rent, and even though the tenants believe they paid only rent. In 2 hours, the jury found that respondents had not acted in bad faith.

Based on the jury's findings, the trial court ordered respondents to refund the jury-found security to each class member who made a claim (JAI 4296-4297). All parties appealed. So far as is pertinent here, the Court of Appeal (2d Civ. No. B057796; 23 Cal.Rptr.2d 420 (1993)) reversed the trial court's forfeiture of respondents' offsets. The California Supreme Court granted review.

The Opinion of the California Supreme Court – *Granberry v. Islay Investments*, 9 Cal.4th 738 (1995)

In *Granberry v. Islay Investments*, 9 Cal.4th 738 (Pet. App. 1-38) (1995), the California Supreme Court held that, under the statutory scheme enacted by the California Legislature in Civil Code section 1950.5, good faith landlords are entitled to claim equitable offsets against a security deposit – even within the procedural context of a class action (*Id.*, 9 Cal.4th at p. 743 (Pet. App. 2)). The California Supreme Court rejected petitioners' characterization of the offsets as distinct from the security and also rejected petitioners' claim that the resolution of offsets against absent class members would involve a "default" judgment. The Court held that Civil Code section 1950.5 gives the tenant the right only to the "remaining portion" of the security (i.e., the "net difference" after deduction of offsets). *Granberry, supra*, 9 Cal.4th at p. 744 (Pet. App. 6). The California Supreme Court directed the trial court to conduct an evidentiary hearing, at which respondents would be required to prove that they suffered damages for unpaid rent, cleaning and repairs and that the amount they claimed was reasonable (*Granberry, supra*, 9 Cal.4th at pp. 749-750 (Pet. App. 16)).

The California Supreme Court also rejected specific arguments by petitioners and by *amicus curiae* California Attorney General that, as a matter of law, the trial court was required to create a fund and was required to dispose of any residue by either fluid recovery or escheat. The Court construed both the California Unclaimed Property Law (Cal. Code of Civ. Proc. secs. 1500, et seq.) and California Code of Civil Procedure section 384, and confirmed that the California Legislature intended to, and

did, preserve the trial court's equitable discretion with respect to the disposition of unclaimed residue in class actions.[11]

The California Supreme Court rejected petitioners' characterization of section 384 as a **substantive** statute which divests the trial court of equitable discretion, and confirmed that section 384 is a **procedural** statute, which simply requires trial courts to make certain findings with respect to unpaid residuals in class actions (*Id.*, 9 Cal.4th at p. 751 (Pet. App. 19)). In light of the California Supreme Court's allowance of respondents' offsets, the trial court was directed to "reconsider" its choice of remedy after the evidentiary hearing (*Ibid.*, at p. 751 (Pet. App. 19)).

Formulation of Class-Wide and Individual Claims Procedures, and the Second Class Notice

On remand, following the directives of the California Supreme Court (*Granberry*, 9 Cal.4th 738, 750-752 (Pet. App. 19)), the trial court shaped a **two-part procedure**: (1) an evidentiary hearing to resolve the class-wide issues with respect to offsets and equitable defenses, and (2) an individualized claims process, to be conducted in accordance with California Small Claims procedures.

The trial court also formulated a second notice for the class (Pet. App. 79-82), to inform absent class members of the status of the litigation and the upcoming proceedings.

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[11] In California, escheat is the "last resort" in class actions. *State v. Levi Strauss and Company*, 41 Cal.3d 460, 475 (1986).

As the California Court of Appeal held, there was no abuse of discretion (Pet. App. 48-49).

The second notice advised the absent class members of the status of the litigation and reminded them that any refund they might be entitled to recover was subject to offsets. The notice stated the date of the evidentiary hearing, and also advised the class of the claims procedure which they were required to follow if they desired a refund. The claim form was attached to the notice, and the notice stated:

> "IF YOU FAIL TO MAKE A TIMELY CLAIM ACCORDING TO THE INSTRUCTIONS PROVIDED IN THIS NOTICE, YOU WILL HAVE NO FURTHER RIGHT OR CLAIM TO RECOVER FROM ANYONE IN THIS CLASS ACTION." Pet. App. 81.

Respondents paid to have petitioners' mailing list updated through a national service (JAII 5064-5066). Notices and claims forms were mailed to 5,386 class members (JAII 5067-5068, 5085-5086).[12] The notice was also published once-weekly for three consecutive weeks in newspapers in Santa Barbara and surrounding counties, where respondents' properties were located (JAII 5075-5087, JAII 5079-5081, JAII 5082-5083). The trial court increased the duration of publication and expanded the

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[12] The national service updated 5,386 of the original 5,438 addresses and the Mailing House mailed 5,386 notices. From that mailing, 3337 notices (62%) were returned (RT 514). Therefore, of the 2,049 class members who presumptively received the second notice, only 76 (3.7%) were sufficiently interested to file claims (Exhs. 296 and 297).

geographical coverage for the second notice to reach tenants who might have moved while the litigation was pending (JAI 1598-1600, 1892-1893).

The notice was not required to advise each individual class member of the specific amount of the offsets claimed against him or her, just as it was not required to advise each class member of the specific amount of his or her security.[13] A class action notice need only describe the general nature of the action and the plaintiffs' rights in it (*see, e.g., Phillips Petroleum Co. v. Shutts, supra,* 472 U.S. 797, 811-812; *see, also, In re Cement and Concrete Antitrust Litigation* (9th Cir., 1987) 817 F.2d 1435, 1440-1441 (no due process violation where notice of settlement failed to advise absent class members that trial court had ordered offsets against their share).[14]

Until the present Petition for Writ of Certiorari, petitioners **never** challenged the class notice as inadequate under *Eisen*. Instead, petitioners' complaints about notice have always been designed to deprive respondents of their right to assert offsets. As petitioners' counsel stated at the hearing after remand: "We could have put a 15-

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[13] California Civil Code section 1950.5 does not provide for "notice" in the context of Constitutional due process. The statute simply requires an "itemized statement" of the disposition of the security (sec. 1950.5, subd. (e)) (Pet. App. 84). Moreover, in a class action, "actual notice" to absent class members is not required. The test is whether the trial court provided the "best notice practicable" to apprize interested parties of the pendency of the action. *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. 156.

[14] Overruled on other grounds in *California v. A.R.C.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989).

second spot in the Super Bowl, but you know, I don't know what to suggest from the [petitioners'] point of view. It's just too long and too far away to ever give notice . . . " (RTII 66). The claim is specious. *Jurisdiction, once gained, cannot be lost.*

The Evidentiary Hearing on Class-Wide Issues

The evidentiary hearing on class-wide issues was presented over four days. Petitioners' characterization of the hearing as an "adjudication" of offsets against non-appearing absent class members (Pet., p. 10) is false. It was stipulated that the scope of the hearing was limited to respondents' *prima facie* proof of offsets and petitioners' class-wide equitable defenses. Petitioners' counsel vigorously represented the class with respect to those issues.

Respondents established their *prima facie* offsets through the uncontroverted testimony of their operations manager and a real estate expert. The expert added indirect turnover costs, which had been omitted, to arrive at the actual damages for each individual tenancy (Exh. 287; RTII 287-292). He then adjusted the costs for ordinary wear and tear for each individual tenancy, considering the duration of each tenancy (RTII 286, 288-289). Based on this uncontroverted evidence, the trial court found that respondents "proved by a preponderance of the evidence that they suffered damages for unpaid rent, repairs and cleaning and that the amount thereof was reasonable" (JAII 6199-6200). The California Court of Appeal affirmed (Pet. App. 46-48).

The trial court also found that respondents' damages were proximately caused by the tenant class members.[15]

During the pertinent time period, respondents' business practice was to bring each unit to "as near as new" condition as possible when each tenant vacated. The class members' rental agreements required them to notify the resident manager if the unit was not in that condition.

Based on this evidence, the trial court specifically found, *inter alia*, in the aggregate, as a result of the 9,240 tenant turnovers during the period at issue, after adjustment for ordinary wear and tear, respondents suffered $1,411,000 in damages in excess of the total amount of the security (JAII 5914.3-5914.4). That $1.4 million in damages, plus all of the jury-found security, was spent for the benefit of the class for unpaid rent and for cleaning and repairs. The California Court of Appeal affirmed (Pet. App. 43).

The Individual Claims Process

It is well within the trial court's discretion to utilize a claims procedure in a class action to process claims and determine individual damages.[16] Federal courts often utilize the "sensible device" of split trials – liability issues

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[15] Under California law, where property is renovated prior to inception of tenancy and surrendered in damaged condition, the lessor has made a *prima facie* case that the tenant caused damage. *Markowitz v. Ikemoto*, 159 Cal.App.2d 242, 246 (1958).

[16] The claims procedure in this case was similar to that utilized in *Shump v. Balka*, 574 F.2d 1341, 1346 (10th Cir., 1978), a class action for the return of "maintenance fees" under a federal statute which provided that rent for public housing tenants

are determined on a class-wide basis and individual damages are resolved during a claims process (*see, e.g., Green v. Wolf Corporation*, 406 F.2d 291, 301 (1968); *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447-448 (5th Cir., 1973)).

The individualized claims process in this case – which petitioners failed to discuss – was conducted in accordance with California Small Claims Court procedures, facilitated by a claims officer and a retired judge acting as referee. For those claimants against whom respondents claimed offsets, respondents provided an itemization of the damages for unpaid rent, cleaning and repairs. Copies of supporting documentation (i.e., invoices, bills, etc.) were provided to the claimant on request (Exhs. 296, 297). If the claimant objected to any of the costs, he or she could request an individual hearing before the referee. In those individual hearings, respondents were required to prove their individualized offsets by a preponderance of the evidence.

The procedures adopted by the trial court to resolve the offsets and equitable defenses were well within the trial court's discretion. The California Court of Appeal so held (Pet. App. 48-49).

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could not exceed 25% of their income. In *Shump*, pursuant to a settlement agreement, refunds were sent to the tenants, first reducing each tenant's settlement by his or her delinquent rentals and costs of repair. The tenants were then given 90 days to challenge the amount returned to them. In this case, the claimants were given an opportunity to contest respondents' offsets before any money was distributed.

Petitioners Conceded the Trial Court's Discretion to Order a Claims-Made Remedy, i.e., Reversion of the Unclaimed Residue to Respondents

Petitioners' claim of error with respect to the disposition of the unclaimed residue is flawed, not only by their concession of the trial court's discretion to order that remedy, but because the substantive law is to the contrary.

In *Granberry, supra,* 9 Cal.4th 738 (Pet. App. 1-38), the California Supreme Court considered petitioners' challenges to the trial court's *power* to order the reversion of unclaimed funds to respondents. Any federal constitutional challenge should have been raised at that time – petitioners did not do so. Instead, petitioners urged a construction of California Code of Civil Procedure section 384 and the California Unclaimed Property Law (Code of Civ. Proc. sec. 1500, et seq) which would bar reversion. The California Supreme Court rejected the argument, and directed the trial court to utilize section 384 as guidance to shape the remedy on remand. The California Supreme Court specifically held that the California Legislature had preserved the trial courts' equitable discretion (*Granberry, supra,* 9 Cal.4th at pp. 750-751 (Pet. App. 18-19)).

On remand, petitioners' counsel **conceded** that the trial court had discretion to again order a claims-made remedy (RT II, 757):

> "THE COURT: So you believe that the Court has discretion, but under the facts of this case it would be an abuse of discretion to allow the money to go back to the defendant. Is that your position?

> [Petitioners' Counsel]: I think that that's the fairest reading of the Supreme Court decision, that they have not come down and said you don't have the discretion. . . . " (RTII 757).

Therefore, the only question before the trial court was whether the claims-made remedy was fair *on the facts.*

The uncontroverted evidence was that, on a class-wide basis, from April, 1978 to September, 1984, respondents collected security in the total amount of $1,418,559 ($976,559 as "rent differential" and $442,000 as "security deposits"). Of the $442,000 which respondents had taken under the security deposit program, $348,000 had already been returned. Thus, the net revenue was $1,072,000 (JAII 5914.3). During the same period, respondents' total costs, adjusted for ordinary wear and tear, were $2,484,000. Therefore, while the rent discount program was in place, respondents suffered a net loss of $1.4 million (JAII 5914.3).

Respondents' net loss *represents money actually spent for the benefit of the absent class members* for unpaid rent, cleaning and damages – the trial court specifically found no unjust enrichment (JAII 5914.14). The trial court also specifically found that "disgorgement" or escheat would improperly penalize respondents for their good faith misinterpretation of an uncertain statute, particularly since there was nothing to "disgorge" or "escheat" (JAII 6122-6123, 6201, 6208). The California Court of Appeal affirmed (Pet. App. 49).

Under these circumstances, petitioners' claim that the claims-made remedy constituted a "taking" without due process is entirely without merit for numerous reasons:

First, there was no taking, because there was nothing to take – all of the security, plus $1.4 million, had been spent for the benefit of the class.

Second, as noted above, the security does not "belong" to the tenant in any event. Under California law, there is a debtor-creditor relationship between landlord and tenant with respect to the security. *Korens v. R. W. Zuken, supra,* 212 Cal.App.3d 1054.

Third, nothing occurred "without due process" because the requisite notices were given to the class.

Finally, the state court's order of reversion is consistent with federal law.[17] *See, e.g., Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989), where the court found that it was more appropriate to return a portion of the unclaimed residue of a Title VII fund to the defendant than to order *cy pres*.[18] The court based its ruling on the compensatory purpose of Title VII, noting that the disputed hiring policy "was not a product of invidious discrimination but represented a market decision that the

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[17] In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), cited by petitioners, this Court held that absent class members have an equitable interest in any fund created by the action for the purpose of responsibility for attorneys' fees. This Court recognized Boeing's right to the unclaimed funds if the absent class members failed to make a claim (*Ibid.*, 44 U.S. at p. 482).

[18] In this case, *cy pres* had already been achieved because more money had been spent on the tenancies (i.e., $1.4 million) than comprised the theoretical net residue ($750,000).

airlines believed in good faith to be legal, but found out to the contrary" (*Id.*, 880 F.2d 807, 815, emphasis added). *See, also, Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir., 1997), *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir., 1991), and *Societe Generale De Banque v. Touche Ross & Co.*, 729 F.2d 628 (9th Cir., 1983) (all involving reversion or payback of unclaimed settlement funds to defendants.)[19]

The Opinion of the Court of Appeal (Pet. App. 39-57) and the Supreme Court's Denial of Review

In light of the procedural history set forth above, it is not surprising that the California Court of Appeal affirmed the trial court's rulings. The appellate court found jurisdiction over the class under *Phillips Petroleum Co. v. Shutts, supra*, 472 U.S. 797, and also found, as a matter of fact, that petitioners "acknowledged that the trial court has jurisdiction" to resolve the affirmative defense of offset (Pet. App. 44). The Court also found no abuse of discretion with respect to the claims made remedy (Pet. App. 49).

The California Supreme Court properly denied review because it had already decided all of the rules of

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[19] In *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), cited by petitioners, the Ninth Circuit first acknowledged the trial court's "broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds," but found reversion not an available option because (a) the objective of the Farm Labor Contractor Registration Act is deterrence in all cases, (b) defendant made no effort whatsoever to comply with the law (*Id.*, 904 F.2d at pp. 1303-1304, 1307, 1309).

California law and statutory interpretation applicable to the case and because the California Court of Appeal had properly found that the trial court lawfully exercised the discretion conferred upon it to resolve the remaining issues in the case.

CONCLUSION

"The class action is a product of the court of equity – codified in section 382 of the Code of Civil Procedure. It rests on considerations of necessity and convenience, adopted to prevent a failure of justice." *Granberry, supra,* 9 Cal.4th 738, 750 (Pet. App. 18). There was no error here.

Petitioners selected a class action as the procedural vehicle by which to litigate their claims. They described the class as broadly as possible in order to maximize their potential recovery. They pleaded respondents' right to claim offsets, insisted that the trial court had jurisdiction to resolve all the issues, and argued that they could adequately represent the class with respect to all issues. Yet, once the California Supreme Court found that respondents were entitled to claim offsets, petitioners abandoned their prior position, and began to apply class action law only to their claim of "security" and not to respondents' defensive claim of offsets. The California Courts properly rejected that approach. There are no

grounds – and there is no cause – for this Court to review the matter.

Respectfully submitted,

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APPENDIX

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(All papers should be served
at the San Francisco Address)

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SANTA BARBARA

LISA GRANBERRY, et al. Plaintiffs, v. ISLAY INVESTMENTS, et al. Defendants.	NO. 136428 DECLARATION RE: MAILING OF NOTICE TO CLASS

I, Morris C. Klein, declare:

1. I am the Chief Executive Officer of Direct Mail Marketing Services, Inc., and my business address is 144

Townsend Street, San Francisco, California 94107. I am over the age of eighteen years and not a party to the within entitled action, and if called as a witness could and would testify competently thereto.

2. Direct Mail Marketing Services, Inc., was provided with approximately 8,000 to 9,000 forms of which Exhibit "A", attached hereto, is representative. Direct Mail Marketing Services, Inc., supervised the transcription of forwarding addresses from those forms. There were 5,438 forms that contained forwarding addresses.

3. For each forwarding address a copy of the Notice To Class, Exhibit "B", attached hereto, was addressed to the persons at the address on the service list, attached hereto as Exhibit "C".

4. On December 28, 1987, I caused the attached Notice To Class to be deposited in the United States mail at San Francisco, enclosed in a sealed envelope, with postage thereon fully pre-paid, addressed as shown on the attached service list.

I, Morris C. Klein, declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 1988, at San Francisco, California.

/s/ Morris C. Klein
MORRIS C. KLEIN

EXHIBIT A

ISLAY INFORMATION FORM

CONTRACT NUMBER _____

CONTRACT DATE __/__/__

TENNANT #1

First Name _____

Last Name _____

Forwarding Address _____
_____
_____

TENNANT #2

First Name _____

Last Name _____

Forwarding Address _____
_____
_____

TENNANT #3

First Name _____

Last Name _____

Forwarding Address _____
_____
_____

APARTMENT NAME _____

UNIT NO.___

IN __/__/__ NOTICE __/__/__

VACATED __/__/__ FIRST MONTHS RENT ___

SECOND MONTHS RENT ___

##########

DAMAGE Yes __ No __

EXCESSIVE CLEANING TIME Yes __ No __

FURNITURE

_____

DAMAGE

_____

COMMENTS

_____

CLEANER'S NAME _____

CL. TIME _____

_____

EXHIBIT B

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA BARBARA

LISA GRANBERRY, et al., Plaintiffs, v. ISLAY INVESTMENTS, et al., Defendants.	NO. 136428 NOTICE TO CLASS

TO ALL PRESENT AND PAST TENANTS OF RESIDENTIAL APARTMENTS MANAGED BY ISLAY INVESTMENTS:

If you currently reside in an apartment managed by Islay Investments or if you vacated an apartment managed by Islay Investments on or after September 27, 1978, and paid a higher amount of rent for the first month (or 31 days) of the tenancy than for the second and subsequent months, so long as you paid on a monthly basis;

YOU ARE HEREBY NOTIFIED that a class action lawsuit is pending on your behalf in the Santa Barbara Superior Court.

In the lawsuit, the Plaintiffs have alleged that the Defendant, Islay Investments, has charged its tenants a nonrefundable security deposit in the form of a surcharge on the first month's rent. Plaintiffs allege that each time Defendants charged a higher amount for the first months' rent than for the second and subsequent months. Defendants violated various provisions of California Civil Code Section 1950.5.

Defendants contend that the entire amount charged and collected for the first month (or 31 days) of any tenancy at a building managed by Islay Investments was solely for the tenant's use and occupancy of the premises and therefore, constituted rent, and was not any form of "security" or other refundable fee or charge. Defendants also contend that any refund you might be entitled to recover must be reduced by the amount of any unpaid rent, costs reasonably necessary to clean and repair damage you caused to the apartment, in excess of ordinary

wear and tear, and that such sum could exceed the amount of any refund or damages you might receive.

YOU ARE FURTHER NOTIFIED that this lawsuit seeks from Defendant Islay Investments an accounting of the nonrefundable alleged security deposits, interest on the alleged security held or disbursement of profits made on the alleged security held, and punitive damages not to exceed the sum of $200.00 per violation of Civil Code Section 1950.5(h). In addition Plaintiffs seek a court order declaring that defendants' rent surcharge is a nonrefundable security deposit which is prohibited by Civil Code Section 1950.5. Plaintiffs' attorneys estimate that reasonable attorneys fees and costs will total 25% or less of the total aggregate recovery, which fees and costs will be deducted from any recovery.

YOU ARE FURTHER NOTIFIED that you may be *excluded* as a participant in this class action lawsuit by submitting a written request on the attached form to:

Santa Barbara Superior Court
Clerk, Department 1
1100 Anacapa Street
Santa Barbara, California 93102

If you are a member of the above described class of persons and do not submit a written request to be excluded you will be represented by Plaintiffs' counsel and will be bound by any judgment in the action whether it be favorable or unfavorable. If you do not wish to be represented by Plaintiffs' counsel you may intervene in this action through counsel of your own choosing.

THIS NOTICE IS NOT TO BE UNDERSTOOD AS ANY EXPRESSION OF ANY OPINION BY THIS

COURT AS TO THE MERITS OF ANY OF THE CLAIMS OR DEFENSES ASSERTED BY EITHER SIDE IN THIS LITIGATION. THIS NOTICE IS SENT FOR THE SOLE PURPOSE OF INFORMING YOU OF THE PENDENCY OF THIS LITIGATION SO THAT YOU MAY DECIDE WHAT STEPS YOU DESIRE TO TAKE IN RELATION TO THIS LITIGATION.

Plaintiffs are represented by:

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Goux & Romasanta
831 State Street,
Suite 32
Santa Barbara, California
93101

Betty L. Jeppesen
800 Garden Street
Santa Barbara, California
93101

Anyone may examine the file in this action in the office of the Clerk for the Superior Court at 1100 Anacapa Street, Santa Barbara, California.

DO NOT CALL THE COURT!

Dated: August 10, 1987

RONALD C. STEVENS,
SUPERIOR COURT JUDGE

The undersigned requests to be excluded from the Plaintiff class that has been certified in this action.

Dated: _____, 1987.

_____
Signature

Please Print:

Your name: _____

Your address: _____ (Street)
_____ (City)
_____ (State)
_____ (Zip Code)

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am a citizen of the United States and a resident of the State of California. I am over the age of eighteen years and not a party to the within entitled action; my business address is 722 Montgomery Street, San Francisco, CA 94111.

On January 13, 1988, I served the within: DECLARATION RE: MAILING OF NOTICE TO CLASS (the actual service list being submitted only to the court, 191 pages of addresses), on the interested parties in said action, by depositing in the United States mail at San Francisco, true copies thereof enclosed in a sealed envelope:

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Crahan, Javelera, et al.
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BETTY L. JEPPESEN
800 Garden St.
Santa Barbara, CA 93101

WILLARD HASTINGS, ESQ.
Legal Defense Center
906 Garden St.
Santa Barbara, CA 93901

I, Debra M. Swann, declare under penalty of perjury that the foregoing is true and correct.

Executed on January 13, 1988, at San Francisco, California.

/s/ Debra M. Swann
DEBRA M. SWANN

California Code of Civil Procedure Section 431.70

Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall not exceed the value of the relief granted to the other party. The defense provided by this section is not available if the cross-demand is barred for failure to assert it in a prior action under Section 426.30. Neither person can be deprived of the benefits of this section by the assignment or death of the other. For the purposes of this section, a money judgment is a "demand for money" and, as applied to a money judgment, the demand is barred by the statute of limitations when enforcement of the judgment is barred under Chapter 3 (commencing with Section 683.010) of Division 1 of Title 9.

Supreme Court, U.S.
FILED
DEC 23 1999
CLERK

(3)

No. 99-806

In The

Supreme Court of the United States

LISA GRANBERRY, COSETTI JORDAN, ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL,

Petitioners,

On behalf of themselves and all others similarly situated,

v.

ISLAY INVESTMENTS, a California General partnership, MARVIN TREVILLIAN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

REPLY TO BRIEF IN OPPOSITION

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3pp

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

I. RESPONSE TO ISLAY'S POINT "A": THE PETITIONERS HAVE STANDING TO RAISE BEFORE THIS COURT THE CONSTITUTIONAL INFIRMITY OF THE CLASS JUDGMENT

Respondents ("Islay") contend that petitioners lack standing to assert the rights of absent class members because the named plaintiffs either had no individual claim left or failed to pursue their individual claim through the trial court claims process. Additionally, Islay contends that this Court's class action jurisprudence precludes the named plaintiffs in a plaintiffs' class action from asserting a claim of violation of due process rights of absent class members – that such claims may only be brought by the absent class members themselves in proceedings collaterally attacking the judgment in the underlying action. Islay cites to footnote 6 in this Court's decision in *Zablocki v. Redhail*, 434 U.S. 374, 380 (1978) where the Court held that the Appellant lacked standing to challenge the sufficiency of notice to absent members of the *defendant class* for which appellant had been made class representative in the District Court.

Islay's citation to *Zablocki* is noteworthy because in *Zablocki* the plaintiffs had moved for the certification of a defendant class of all County Clerks in the State of Wisconsin, appellant Zablocki had not contested the certification of the defendant class, the legal issue concerned the constitutionality of a Wisconsin statute limiting the availability of marriage licenses, and the appellant and his class of County Clerks were represented before the Court by the Wisconsin Attorney General. The facts do not

suggest that any County Clerk had an individualized factual defense to the action for which *Zablocki* was not an adequate representative, nor that the Wisconsin Attorney General could not adequately represent the interests of all of the state's county clerks.

In contrast, at no time did Islay ever move in the California Courts to certify a class of tenants as cross-defendants or as parties to offset claims, or to establish that the Petitioners could act as adequate named representatives of such a class. To the contrary, Petitioners repeatedly opposed affirmative claims against individual absent class members on the ground that the class members were not present before the court and the named representatives could not adequately represent them on Islay's individual affirmative claims in their absence. These basic differences between the procedural posture in *Zablocki* and the procedural posture in the state courts below here demonstrate why *Zablocki* is inapplicable.[1]

Islay also cites to an opinion of the Court of Appeals for the Ninth Circuit in *Epstein v. MCA*, 126 F.3d 1235 (9th Cir. 1997) (*"Epstein II"*) as supporting its contention that an inadequate representation claim should be brought only by the absent class member in a collateral proceeding. The opinion cited by Islay was withdrawn by the Ninth Circuit and replaced with a decision reversing the holding of the decision Islay cited. *Epstein v. MCA*, 179 F.3d 641 (9th Cir. 1999) (*"Epstein III"*).

---

[1] It should also be noted that both the Court's holding in *Zablocki* and a revision of the offending statute had made the issue whether the District Court judgment was binding on the absent County Clerks a possibly "academic" matter.

In *Epstein II* the Ninth Circuit had held that an absent class member could pursue a claim in federal court alleging inadequate representation by the class representatives in a Delaware state court class action proceeding. In *Epstein III* the Court changed its view, holding that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482 (1982) did not afford an absent class member a right of collateral attack:

> Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court. See, e.g., *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558 (3rd Cir. 1994) (refusing to allow absent class members collaterally to challenge adequacy of representation because the opportunity to challenge that determination by appeal to Delaware Supreme Court, and thereafter to the United States Supreme Court, "granted all the process that was due"); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991) (holding that so long as procedural safeguards were employed, objections to the determinations of a certifying court had to be remedied on appeal to the state supreme court or the United States Supreme Court, and not by recourse to the "federal courts in the vain pursuit of back-door relief").

Under the law of the Ninth Circuit as it exists today, it is highly doubtful that an absent member of the plaintiff class could obtain a review of the adequacy of state

court representation in the federal courts. The only viable opportunity for review is through Certiorari to this Court.

It is also paradoxical that Islay argues both that there was no error in the trial court in part because "Petitioners' counsel vigorously represented the class" (Brief in Opposition, page 17), and that Petitioners have no standing to represent the class for purposes of bringing a due process challenge in this Court.

Despite the absence of any certification of a defendant class, Islay asserts in its Brief in Opposition that the trial court found that the class members had caused damage to Islay in an aggregate amount that was "$1,411,000 in damages *in excess* of the total amount of the security." (Brief in Opposition, page 18, emphasis in original) Obviously, whatever damages Islay actually may have suffered were not caused by the class acting as a group, but by individual class members in their occupancy of individual units.

In the California Supreme Court in *Granberry III*, in the trial court, in the Court of Appeal, and in their Petition for Review to the California Supreme Court following the issuance of *Granberry IV*, Petitioners contended that the trial court could not make a determination of damages suffered by Islay at the hands of absent class members because those absent class members lacked adequate representation with respect to the facts of each individual offset claim that comprised the aggregate finding. Petitioners are the fiduciaries of the absent class members for whom they have consistently

raised this contention. Certiorari is the appropriate vehicle for Petitioners to fulfill their duty to challenge the state court procedures that denied due process to the absent class members.

II. RESPONSE TO ISLAY'S POINT "B": PETITIONERS PRESERVED THEIR CHALLENGE TO THE STATE COURT PROCEEDINGS

Islay contends that Petitioners have failed to preserve the issue of personal jurisdiction for review in this Court, citing to the California Court of Appeal decision in *Granberry IV*. (Petition, page App. 44) A review of the California appellate court's discussion of the personal jurisdiction issue on pages 44-45 shows, however, that the issue has been preserved throughout. Even though the state appellate court found that Petitioners had "acknowledged that the trial court has jurisdiction to resolve the affirmative defense of offsets," it did not hold that such acknowledgement constituted a procedural bar to raising the issue. Indeed, the Court of Appeal noted (Petition, page App. 45) that it changed its decision in *Granberry II* in response to Petitioners raising that issue.[2]

Most importantly, the parties to the litigation cannot by agreement confer personal jurisdiction on persons absent from the proceedings where the absent parties' interests are not being adequately represented. *Zenith*

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[2] What Petitioners acknowledged was that the trial court had *subject matter* jurisdiction to determine the offsets. Petitioners have never agreed that the trial court had *personal jurisdiction* to bind absent class members on Islay's affirmative offset claims.

Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100, 110-111 (1969), *Griggs v. Superior Court*, 16 Cal.3d 341, 344 (1976).[3] Hence, the finding in *Granberry IV* that Petitioners acknowledged the jurisdiction of the trial court cannot be dispositive of the issue.

Islay also contends that Petitioners failed to preserve the issue by not appealing the order granting class certification when it was issued in 1982. As noted in the Petition (page 4), when the trial court granted Petitioners' motion for class certification, Islay had not asserted any affirmative claims or defenses against absent class members. Thus, there was no reason to challenge the grant of class certification. Moreover, an order *granting* (as opposed to denying) class certification is not an appealable order in California. *Blue Chip Stamps v. Superior Court (Botney)*, 18 Cal.3d 381, 388 (1976), *Shelley v. City of Los Angeles*, 36 Cal.App.4th, 692, 696 (1995). Weill & Brown, *California Procedure Before Trial*, The Rutter Group, 1998, ¶¶ 14:105-106.

Lastly, Islay contends that the notice given to the absent class members per *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) "advised the absent class members that they would be represented by petitioners' counsel." (Brief in Opposition, p. 2) This statement goes to the core of the question Petitioners are presenting to this Court: Is *Eisen*-type notice to absent class members sufficient to satisfy due process where the defendant seeks individual offsets against absent class members raising unique individual

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[3] "The parties to a judicial proceeding cannot, either jointly or severally, effectively stipulate or concede that the court either has or lacks jurisdiction to act in the particular matter."

fact issues for each class member, where there has been no determination that the representative plaintiffs can adequately represent the absent class members on the offset claims, and when plaintiffs have continuously stated their incapacity to represent absent class members on the defense of the individual affirmative claims?

This Court has not addressed directly the extent, if any, to which procedures developed for prosecuting common or identical claims on behalf of a class may be relied upon to permit the adjudication of claims raised against those absent class members. The issues raised by this Petition go to the heart of the due process underpinnings for class action litigation. The resolution of those issues will obviously have great impact on the utility of the class action device for resolving legitimate class claims in both state and federal courts.

III. RESPONSE TO ISLAY'S POINT "C": THE PETITION PRESENTS SERIOUS QUESTIONS AFFECTING CLASS MEMBERS' DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION

In footnote 1 of Islay's Brief in Opposition, Islay states that "[t]he California Courts did not decide any of petitioners' alleged federal questions." This statement is patently untrue.

As previously noted, the *Granberry IV* decision, citing *Phillips Petroleum Co. v. Shutts, supra,* 472 U.S. 797, 811-812, held expressly that petitioners' due process challenge to the offset determination procedure had been determined against petitioners by the California Supreme

Court in *Granberry III.* (Petition, pages App. 44-45). The California Supreme Court denied review of the *Granberry IV* decision, thereby impliedly ratifying the *Granberry IV* characterization of the California Supreme Court's ruling in *Granberry III.*

IV. THE ADJUDICATION OF ADVERSE CLAIMS AGAINST ABSENT UNREPRESENTED CLASS MEMBERS, AND THE SUBSEQUENT EXTINGUISHMENT OF THE ESTABLISHED DEBT OWED BY ISLAY TO THOSE ABSENT CLASS MEMBERS, CONSTITUTED FUNDAMENTAL FAILURES OF DUE PROCESS PROTECTIONS THAT THREATEN THE EFFECTIVE UTILIZATION OF CLASS ACTIONS IN ALL STATE AND FEDERAL COURTS

The trial court adjudicated individualized claims against thousands of absent class members who could not and were not adequately represented by the named class representatives for purposes of defending such claims. After granting defendants every individual claim in its entirety, the trial court was faced with the task of deciding what to do with the remaining money still owing by defendants to the absent class members. Exercising a lawless and unfettered discretion, the trial court chose to extinguish defendants' debts to the absent class members without reference to any cognizable legal or equitable principle.

The actions of the trial court, approved and ratified by the California Appellate Courts, ran roughshod over the due process rights of absent class members that this

Court has repeatedly warned must be assiduously protected. It is plain from the appellate court record in this case that the California Courts have read the published opinion of the California Supreme Court in *Granberry III* as granting permission to trial courts to adjudicate affirmative claims raised by a class action defendant against absent class members, even where it is obvious that the class representatives could not adequately represent absent class members on the defense of the individual claims asserted against them. It is further plain from the state appellate court record in this case that trial courts in California have unfettered discretion to extinguish lawful debts arising in the context of a class action, and to do so without reference to any rule of law or established equitable principles.

These "innovations" in class action procedure adopted in defiance of this Court's class action jurisprudence threaten the continued utility of class actions as a means for litigating common issues of law and fact and for providing a remedy where large numbers of individuals have valid claims too small to make individual litigation practicable. If defendants in class actions may assert claims against absent class members and have trial courts adjudicate such claims without affording the individual class member affected the same opportunity to appear and defend that would be available if the defendant asserted the claim in an individual action, the temptation to assert spurious claims or claims of questionable validity will be irresistible. The knowledge that few absent class members will actual appear to contest their individual claims, while the majority of claims are adjudicated by default in favor of the class action defendant, will

insert yet another tool for injustice into class action procedures that already have their fair share of problematic practices.

Similarly, if a judgment establishing money damages at law in favor of absent class members can be undone by a defendant's appeal to the trial judge to exercise an unfettered discretion to excuse the defendant from its legal obligations, the rule of law will be replaced by the personal caprice of trial judges. The extensive and extended litigation often required for the assertion of class action claims will become an exercise in futility if the discretion afforded trial judges to shape an equitable remedy for the absent class members becomes a power to nullify the class members' legal rights for which the class representative sought vindication.

V. CONCLUSION

The Court should grant the Petition for Certiorari on the questions presented.

Respectfully submitted,

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